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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 159.

CHARLES T. BARNEY, APPELLANT,

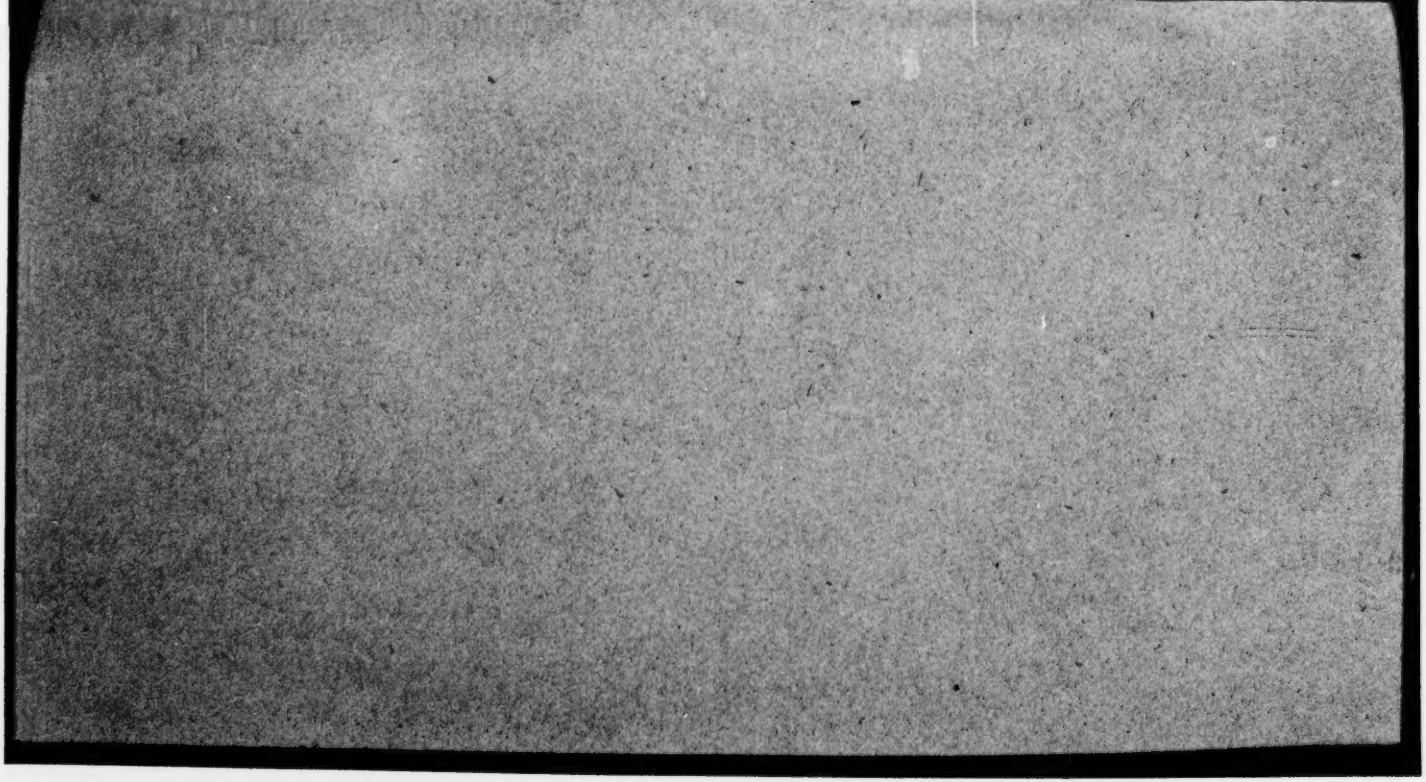
vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 12, 1902.

(13,734.)



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1 The President of the United States of America to The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit; John B. McDonald, and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, in equity, on the first Monday of October, A. D. 1902, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Charles T. Barney, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 25th day of August, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America, the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

MASTEN & NICHOLS,
Solicitors for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first
2 Monday of October, 1902, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

I hereby certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, The City of New York, by exhibiting to Charles V. Fornes, acting mayor of said city, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, Board of Rapid Transit Railroad Commissioners for the City of New York, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said board, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at city of New York, in my district, I served the within subpœna in equity

upon the within named defendant Seth Low, one of the commissioners of rapid transit, by exhibiting to Charles V. Fornes, who was acting mayor and who accepted service for said defendant, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant Edward M. Grout, one of
3 the commissioners of rapid transit, by exhibiting to Hubert L. Smith, assistant deputy comptroller, and who accepted service for said defendant, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendants, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said commissioners, the within original and at the same time leaving with him a copy for each thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant John B. McDonald, by exhibiting to De Lancey Nicoll, of the firm of Nicoll, Anable & Lindsay, attorneys for said defendant, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, by exhibiting to Charles P. Howland of the firm of Howland, Murray & Prentice, as attorneys for said defendant the within original, and at the same time leaving with him with a copy thereof.

WILLIAM HENKEL,
U. S. Marshal, S. D. N. Y.

New York, August 25th, 1902.

4 (Endorsed:) U. S. circuit court, southern district of New York, Filed Aug. 26, 1902, John A. Shields, clerk.

5 In the Circuit Court of the United States for the Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Charles T. Barney, a citizen of the State of New York and an inhabitant and resident of the southern district of New York, brings this, his bill of complaint against The City of New York, which is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, The
6 Board of Rapid Transit Railroad Commissioners for the City of New York, a board organized and existing under and by virtue of the laws of the State of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit, John B. McDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, each of whom is a citizen and inhabitant of the State of New York, and resides in the southern district of New York.

And thereupon your orator complains and says:

That the names, the residences and citizenship of the parties to this suit are correctly stated in the introduction of this bill: and the same are hereby incorporated by reference in this paragraph of this bill with the same effect as if the same were separately set forth here specifically and at length.

And your orator further shows that the above-named defendant, The City of New York, is a municipal corporation, organized and existing under and by virtue of the laws of the State of New York.

And your orator further shows that the above-named defendant, The Board of Rapid Transit Railroad Commissioners for the City of New York, was created, organized and exists under and by virtue of chapter 4 of the Laws of 1891, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and of the several acts amendatory thereof and supplementary thereto. The said Board of Rapid Transit Railroad Commissioners, as plaintiff is informed and believes, has no power or authority to do any of the

acts or to take any of the proceedings hereinafter mentioned, except as it claims to have such power pursuant to and by virtue of the said chapter 4 of Laws of 1891 and the said several acts amendatory thereof and supplementary thereto.

And your orator further shows, on information and belief, that the above-named defendants, Seth Low, Edward M. Grout,
7 Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin are commissioners of rapid transit appointed or constituted as such pursuant to the provisions of the said statutes hereinbefore mentioned, and comprise and constitute the said Board of Rapid Transit Railroad Commissioners for the said City of New York, hereinafter referred to as the board.

And your orator further shows, on information and belief, that on the 15th day of July, 1902, the said Ira A. Shaler, departed this life, in the city of New York, intestate, and that thereafter letters of administration on the goods, chattels and credits of the said Ira A. Shaler were issued by the surrogate of the county of New York to the defendant Mary L. Shaler.

And your orator further shows that he is, and since the 30th day of April, 1870, has been seized in fee of all those certain lots, pieces or parcels of land, with the building and improvements thereon, situate on the easterly side of Park (or Fourth) avenue and the northerly side of Thirty-eighth street, and which taken together as one parcel are described as follows: Beginning at the northeasterly corner of Fourth avenue and Thirty-eighth street, thence running northerly along said side of Park (or Fourth) avenue fifty-seven feet and nine inches; thence easterly and at right angles with Park (or Fourth) avenue one hundred and fifteen feet; thence southerly and parallel with Park (or Fourth) avenue fifty-seven feet and nine inches to the northerly side of Thirty-eighth street, and thence westerly along said side of Thirty-eighth street one hundred and fifteen feet to the point or place of beginning; and is the owner of all the easements in said Park avenue in front of said premises appurtenant to the owners of property abutting on the public streets in the said city of New York.

And your orator further shows on information and belief, that on or about the 6th day of November, 1894, it was determined by vote of the people of the city of New York, as provided in sections
8 12 and 13 of chapter 752 of the Laws of 1894, that a rapid transit railway or railways should be constructed for and at the expense of said city, and thereupon various proceedings were had by the said board, assuming to act under the statutory provisions hereinbefore referred to, for the purpose of determining a route or plan of construction for such rapid transit railway. On the 14th day of January 1897, and the 4th day of February, 1897, the said board, by the concurrent vote of six members thereof, did determine that a rapid transit railroad for the conveyance and transportation of persons and property, in addition to those already existing, was necessary for the interest of the public and of the city of New York,

and did, on the said days, by the same concurrent vote of the said six members, determine that the route or routes and general plan of construction of a rapid transit railway for the conveyance and transportation of persons and property should be established in the city of New York, as set forth in a certain report transmitted by the said board to the common council of said city, as hereinafter stated. Copies of the said resolutions and said report to the common council are hereunto annexed, marked, respectively, Schedules "A" and "B," and are hereby made a part of this complaint.

That it was provided by section 4 of said chapter 4 of the Laws of 1891, as amended, that the general plan to be determined and established by the said board should show the general mode of operation of such railway, and should contain such details as to manner of construction as might be necessary to show the extent to which any street, avenue or other public place was to be encroached upon and the property abutting thereon affected.

The route or routes and general plan of construction as determined by the said board by the resolutions aforesaid, purported to comply with the foregoing provisions, and set forth, among other
9 things, a route to be constructed (in part) from a point under private property lying between Eighth and Ninth streets, and east of the westerly side or line of Lafayette place, produced, to Fourth avenue; thence under Fourth avenue and Park avenue to Forty-second street; thence turning from Park avenue into Forty-second street and taking for the purposes of the curve, if necessary or convenient, private property at the southwest corner of Park avenue and Forty-second street; thence under Forty-second street to Broadway. Said route was also to include suitable tracks and connections from the portion thereof near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station; it being provided that all of the tracks and connections last mentioned should be under Park avenue and Forty-second street and private property to be acquired. It was further provided as a part of the general plan of construction adopted by the said resolutions, that the route, from the southerly end of Centre street to the junction at or near One hundred and third street and the Boulevard, should consist of four parallel tracks; that the tracks should be of standard gauge—that is to say, of a width of 4 feet and $8\frac{1}{2}$ inches between the rails; that there should be $12\frac{1}{2}$ feet width in the tunnels and on the viaducts for each track, except that at stations, switches, turn-outs, curves and cross-overs the width might be increased to the extent permitted by the width of the tunnel; that the tracks wherever passing over or under the street should be placed over or under the central part of the street, except that no tunnel or viaduct or any wall, or part thereof, under or along a street, should, except at the stations, station approaches, curves and at places of access to sub-surface structures, as thereinafter in said resolutions provided, be within a distance of 5 feet from the exterior line or side of the street.

It was further provided that the maximum widths of the tunnel

in the clear should be, for the route under Park row and the
10 City Hall Park route, 38 feet; for the route from at or near the south end of Centre street and to the commencement of New Elm street, 50 feet; for the route from at or near the commencement of New Elm street to Lafayette place, 68 feet; from the route from at or near the commencement of Lafayette place to the junction at or near One hundred and third street, 50 feet, except that, wherever the nature of the streets necessitate a curve, an additional width of tunnel might be added not exceeding 3 feet for each track, and except that, on Fourth avenue from Thirty-second street to Forty-third street, the permissible width should be 65 feet. It was further provided that adjacent tracks should be connected by necessary and suitable switches and connections and an additional track for siding accommodation might be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the site of the tunnel should not, by the enlargement of the tunnel for that purpose, be brought within 5 feet of the exterior line or side of the street.

And your orator further shows, upon information and belief, that upon certain drawings or plans adopted by the said board, as set forth in said resolutions, and described as "drawings 1 to 60," it appeared that the plan of the said railway, for so much of the route aforesaid as passed under Fourth or Park avenues, from Thirty-second to Forty-third streets, showed a single tunnel, containing four parallel tracks, under the central part of the said Park avenue, and below a tunnel then and now existing under the surface of said street, and occupied by tracks of the Metropolitan Street Railway Company. The said drawings or plans further showed a width of about 59 feet between the interior or finished surface of the walls of said rapid transit tunnel, and a width of about 65 feet between the exterior surface of the walls of said rapid transit tunnel, and showed the exterior surface of the easterly wall of said tunnel to be at a distance of about 37½ feet
11 from the easterly building or house line of the said Park avenue, between Thirty-fourth and Forty-second streets.

Neither the said drawings, so adopted as aforesaid by said board, nor any of the contract or other drawings to be hereinafter mentioned, provided for any station, station approaches, curves or places of access to sub-surface structures, or for any additional tracks for siding accommodation upon the easterly side of said tunnel, or otherwise, under the said Park avenue between Thirty-fourth and Forty-first streets.

And your orator further shows, upon information and belief, that thereafter, on or about the 2d day of March, 1897, the said board transmitted to the common council of the said city of New York a report containing the said resolutions of January 14th and February 4th, 1897, including the said drawings, together with a brief statement of the reasons of the said board for the adoption thereof. Thereafter, on or about the 23d day of March, 1897, the said common council adopted a resolution approving the said plans and con-

clusions, and consenting to the construction of a railway or railways in accordance therewith. The said resolution of the said common council was thereafter approved by the mayor of the said city of New York on or about the 25th day of March, 1897. Thereafter, on or about the 3d day of April, 1897, the said board submitted the said routes and plans as contained in the said resolutions of January 14th and February 4th, 1897, together with the conclusions of the said board, to the department of public parks of the said city of New York, and thereafter, on or about the 12th day of April, 1897, the said department approved the said routes and plans and consented to the construction of the said rapid transit railway in accordance therewith.

And your orator further shows that thereafter, as by section 5 of said act of 1891 directed, the said board having obtained the approval and consent of the local authorities, proceeded to take
12 steps to obtain, if possible, the consent of the property owners along the line of the routes adopted by them; and in or about the month of May, 1897, your orator received a communication in writing from said board in which the said board represented to your orator that the said board had determined and established certain routes and general plan of construction for the said rapid transit railroad in the said city of New York; that the said communication further represented to the plaintiff that the said routes and general plan of construction were to be in accordance with the said resolutions of January fourteenth and February fourth, 1897, and that with the said communication were enclosed a copy of the said resolutions of January fourteenth and February fourth, 1897, and of the conclusions of the said board which had accompanied said resolutions in their transmission to the said common council of the said city of New York, and also there was so enclosed a proposed form of consent to the construction of the said rapid transit railroad in accordance with the said route and general plan of construction. That during the said month of May, 1897, the said Board of Rapid Transit Railroad Commissioners, by an agent in person, represented to your orator that the said board had established and determined the routes and general plan of construction of the said rapid transit railroad in accordance with the said resolutions of January fourteenth and February fourth, 1897. That your orator, believing the said representations and relying thereon, consented to the construction of the said rapid transit railroad in accordance with said route and general plan of construction, and did not oppose the proceedings hereinafter mentioned, which the said Board of Rapid Transit Railroad Commissioners instituted for the purpose of obtaining the determination of three commissioners appointed by the said appellate division that such rapid transit railroad ought to be constructed and operated; nor did your orator oppose the confirmation of said determination by the said appellate division.

13 And your orator further shows upon information and belief that the said board failed to obtain the consent of the owners of one-half in value of the property along the said routes of

the said proposed rapid transit railroad, and thereafter, as by the said statute provided, the said board, on or about the 3d of June, 1897, petitioned the said appellate division to designate six daily papers in the city of New York, in which notice should be published of an application for the appointment of three commissioners to determine whether or not said rapid transit railroad ought to be constructed. Upon the presentation of the said petition there was submitted to the appellate division, among other things, the resolutions of January 14th and February 4th, 1897, hereinbefore referred to, the report made by the board to the common council of the city of New York, together with the drawings or plans hereinbefore referred to and known as "drawings 1 to 60," and copies of the forms enclosed to property owners in requesting their consent. Thereafter such proceedings were had that commissioners were appointed by the said appellate division, who qualified, and, after proceeding to the taking of the testimony on public hearings, reported the same to the court, together with their determination that the said rapid transit railroad described in the said resolutions of January 14th and February 4th, 1897, and in the report of the said board to the said common council ought to be constructed and operated; and thereafter, on or about the 6th day of April, 1898, an order was entered in the office of the clerk of the said appellate division, whereby the said report was confirmed and the consent of the said court was given to the construction and operation of the said railway as hereinbefore described.

And your orator further shows, upon information and belief, that after obtaining the consents of the local authorities as aforesaid and the authorization of the said appellate division in lieu of the consent of the property owners, the said board, as directed by section 6 of said chapter 4 of the Laws of 1891, proceeded to prepare detailed plans and specifications for the construction of such rapid transit railway, and thereafter, on or about the 24th day of February, 1900, entered into a contract bearing date the 21st day of February, 1900, with the defendant, John B. McDonald, whereby the said John B. McDonald agreed fully to construct and equip the said rapid transit railway upon the routes and general plan hereinbefore referred to, in strict conformity with the specifications contained in said contract, and thereafter to use, maintain and operate the same under a lease thereof from the city of New York for the term of fifty years. It was provided in the said contract that it was made pursuant to the rapid transit statutes hereinbefore referred to, which were to be deemed a part thereof as if incorporated therein. It was further provided that the "routes and general plan" for the railroad adopted by the said board by its resolutions of January 14th and February 4th, 1897, theretofore approved by the authorities of the city and by the appellate division of the supreme court, should be deemed to be incorporated into the said contract as a partial description of the railroad and equipment, and a copy thereof was appended to the said contract; the said specifications provided that the said routes should run under the streets mentioned in the said

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resolutions of January 14th and February 4th, 1897, and further provided that the description therein contained, of the routes and general plan of construction of the said rapid transit railroad was told in general language, but that the location of the various tracks, junctions, routes, grades, termini, etc., were set forth more particularly on the accompanying "contract drawings." Said so-called "contract drawings" did not agree with the said routes and general plan of construction con-
15 tained in the resolutions of January 14th and February 4th, aforesaid, but unlawfully and wrongfully provided that there should be two tunnels for the said rapid transit railroad under the aforesaid portion of Park avenue instead of a single tunnel. It was provided that each of such tunnels should be 24 feet in width between the interior or finished surface of these walls and should each contain two tracks of standard gauge, and that these two tunnels should be 17 feet apart, and, according to said drawings, the exterior surface of the easterly wall of the easterly one of said tunnels would approach to within about 35 feet of the building or house line on the easterly side of Park avenue. All of which will more fully appear by reference to the said contract, specifications and drawings, when produced upon the trial of this action or the hearing of any motion herein.

And your orator further shows that thereafter the said McDonald entered into the performance of the work required to be done by the said contract, and the same is now in progress at various points. On or about the 14th day of September, 1900, as the plaintiff is informed and believes, said McDonald entered into a sub-contract with the said Ira A. Shaler for the construction of that portion of the route of the railroad running from a point 100 feet northwardly from the centre of Thirty-third street to the centre of Forty-first street, under the said Park avenue, in accordance with the provisions of the said contract of February 21st, 1900. Said Shaler thereafter entered upon the land under Park avenue between the streets aforesaid, and engaged in excavating, blasting and performing other general work incident to the construction of tunnels therein and that subsequent to his death, his personal representatives have been and are now engaged in excavating, blasting and performing other general work incident to the construction of the same.

And your orator further shows upon information and belief that the work of construction as now in progress under said Park
16 avenue between Thirty-fourth and Forty-first streets, is not being done in accordance with the said "contract drawings," referred to in the specifications forming part of the aforesaid contract, dated February 21, 1900, in that among other things, the said tunnels are 25 feet in width between their interior or finished surfaces instead of 24 feet, and the exterior surface of the easterly wall of the easterly tunnel instead of being within about 35 feet of the building line on the east side of Park avenue will be distant only about 7 feet therefrom. Plaintiff further shows that said work

as now in course of construction is not in accordance with the "routes and plan" contained in the said resolutions of January 14th and February 4th, 1897, before referred to, or with the drawings forming part thereof and known as "drawings 1 to 60," either as regards the location of the tunnels in the street or the general character thereof, in this, to wit: instead of a single tunnel, as indicated upon said "routes and general plan," the said contractors are engaged in the construction of two tunnels under the said Park avenue, each of which is to be of the width of 25 feet between the interior or finished surface of its walls; and said tunnels are not under the central part of the said Park avenue, but instead thereof the easterly one of the said tunnels is located much further to the eastward than the tunnel indicated upon said "routes and general plan," so that the easterly wall of said tunnel now being constructed will be more than 27 feet nearer to the house line of the houses on the east side of Park avenue between Thirty-fourth and Forty-first streets than the easterly line of the tunnel as shown on said "routes and general plan." That said work has been and is being thus performed by said defendant McDonald and the said Shaler without any authority other than certain directions given by the chief engineer employed by the Board of Rapid Transit Com-
17 missioners and embodied in certain so-called working drawings, or detail drawings, prepared by him or at his instance, and recently approved informally by said board.

And your orator further shows that the fact that such directions had been given by the chief engineer, and that said work was being thus performed by the contractors as aforesaid, was not until recently specifically known to said board; that such action of the said chief engineer and contractors has never been formally or specifically approved by said board; that there has been no change made or authorized by said board in the said "routes and general plan," nor has there been any modification of the contract or specifications with reference to the construction of that part of the tunnel lying under Park avenue between Thirty-third and Forty-first streets; that no notice was given to any of the property owners along said street that it was proposed, by the defendants, or any of them, to change the position of the tunnel to any material extent from the position shown and described in the said "routes and general plan," nor was any opportunity ever given to said property owners or the citizens generally to be heard with respect to any such change.

And your orator further shows that he had no knowledge that this work was being thus unlawfully carried on upon a route not authorized by law until in the month of March, 1902, when, in the course of the prosecution of said work, the foundations of several buildings on Park avenue between Thirty-seventh and Thirty-eighth streets were undermined and weakened and the buildings seriously damaged, and an investigation regarding the cause of said damage made public the fact that the tunnel was not being constructed according to the authorized plans.

That, as your orator is informed and believes, if the work of con-

struction is allowed to be thus unlawfully continued and if hereafter the railroad shall be allowed to be operated along the said illegal and unauthorized route, it will constitute a nuisance to your
18 orator's property and will greatly interfere with his various easements in said avenue and deprive him of the enjoyment thereof; that his buildings will be irreparably injured by the excavations made in said avenue in front of his said premises and by the vibrations caused by the operation of said road.

And your orator shows that, erected on his said premises, is a handsome and valuable four-story residence, in which he resides, and that during the past year, and prior to the time that he had any knowledge of the said changes in the plans for the construction of said tunnel, he made extensive alterations in his said residence at an expense of more than $200,000; and your orator is informed and verily believes that by reason of such illegal and unauthorized construction of said — particularly under the easterly portion of said Park avenue the risk of injury to his said residence, owing to the work of construction, has become much greater than it would have been had the work been done according to the "routes and general plan" adopted by the board as aforesaid, and the risk of damage after the railroad shall have been put in operation by reason of the vibration caused by trains or by other objectionable results is in like manner greatly increased; and that such acts will greatly and irreparably injure and damage your orator's said premises, and will interfere with and interrupt, and have aleady interfered with and interrupted, the lawful use and quiet enjoyment of the same and his other easements appurtenant thereto; that no steps have been taken to acquire said easements; that said unlawful construction has constituted and will constitute an appropriation of the same, and for the damages he will sustain he has no adequate remedy at law.

And your orator further shows upon information and belief, that at none of the times herein mentioned did the said Board of Rapid Transit Railroad Commissioners have authority (if at all) to enter into any contract for the construction of any rapid transit
19 rail road under or upon the said Park avenue, except in accordance with the said "routes and general plan" contained in the said resolutions of January 14th and February 4th, 1897, and that at no time did the said board have authority to prepare detailed plans and specifications, except (if at all) in accordance with the said general plan of construction or to alter any plans or specifications prepared by them, excepting in accordance with said general plan of construction. That the act of the said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized and the defendants McDonald and the said Shaler have entered upon the same unlawfully and without authority; and for the further reason that the construction of the rapid transit railway on the easterly side of Park avenue, in front of your orator's said premises takes his property without due

process of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States, and that said rapid transit act so far as it purports to authorize the construction of a tunnel and railway in said Park avenue without the consent of abutting owners or compensation therefor is void because it deprives your orator of his property without due process of law, in violation of the provisions of the said amendment.

That this suit arises under the Constitution and laws of the United States, and the matter in dispute herein exclusive of interests and costs exceeds the sum and value of two thousand dollars.

To the end, therefore, that your orator may obtain relief in this honorable court where alone it can obtain adequate relief, your orator humbly prays:

First. That the said defendants and each of them, their agents and servants, be enjoined and restrained from further con-
20 structing, or doing any act towards the construction, of a rapid transit railroad tunnel, or the operating of a railroad therein, under Park avenue adjacent to complainant's said premises, until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.

Second. That the said defendants, and each of them, their agents and servants, be enjoined and restrained from further constructing or doing any act toward the construction of a rapid transit railroad tunnel in any part of the sub-surface of Park avenue adjacent to complainant's said premises lying within 37 feet to the west of the building or house line of the easterly side of said Park avenue, or from continuing the work of tunnel construction in such a manner that the easterly side of the tunnel or of the excavation therefor is nearer to the building or house line than the tunnel described and shown in the "routes and general plan" adopted and approved as aforesaid.

Third. That the said defendants, The Board of Rapid Transit Railroad Commissioners, and the members thereof, their agents and servants, and all persons claiming under or through them, be enjoined from giving, granting or in any manner conferring on any person or persons whomsoever, the right, liberty or franchise of excavating under the said Park avenue, adjacent to complainant's said premises, for the purpose of constructing any tunnel whatsoever for a rapid transit railway, or operating a railroad therein, except as aforesaid.

Fourth. That the said defendants be required to fill in the excavations or tunnels unlawfully made, as hereinbefore set forth, in said part of the said sub-surface of Park avenue, and to restore that part of said sub-surface to the state and condition in which it existed previous to such excavations.

21 Fifth. That the defendants, and each of them, their agents and servants, be restrained and enjoined in the manner aforesaid during the pendency of this action.

Sixth. That the plaintiff have such other and further relief as to the court may seem just, together with the costs of this action.

MASTEN & NICHOLS,
Solicitors for the Complainant.

Office and post-office address, No. 49 Wall street, borough of Manhattan, New York city.

MAXWELL EVARTS,
ARTHUR H. MASTEN,
Of Counsel.

22 *Verification.*

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

Arthur H. Masten, being duly sworn, deposes and says that he is one of the solicitors for the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true of his knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent is that the plaintiff is not at present within this country, but is abroad traveling in Europe; that the sources of deponent's information and the grounds of his belief as to the matters alleged in the complaint are conversations had with plaintiff in relation to this matter and an inspection of correspondence and papers in relation thereto now in his possession.

ARTHUR H. MASTEN.

Sworn to before me this 23rd day of August, 1902.

FORSYTH WICKES,
Notary Public (*No.* 141), *New York County.* [SEAL.]

23 SCHEDULE A.

Resolutions Adopting Routes and Plan of Construction.

Resolution of January 14, 1897.

Whereas, this Board of Rapid Transit Railroad Commissioners for the City of New York has determined that a rapid transit railway for the conveyance and transportation of persons and property, in addition to those already existing, is necessary for the interests of the public and of the city of New York, and should be established as hereinafter provided; and

Whereas, this board has duly made the inquest and investigation

necessary or proper in the premises, and all such inquests and investigations as are necessary or proper for such determination;

Now, therefore, this board does hereby, in lieu of all the routes and every route hereby adopted as aforesaid by this board or its predecessors, all and every one of which routes are hereby abandoned, and in lieu of all the general plans and every general plan and of all plans and specifications and every plan and specification for the construction of a rapid transit railway or railways in the city of New York, heretofore adopted by this board or by its predecessor, for all of which general plans other plans and specifications are hereby adopted, adopts the following routes for a rapid transit railway in the city of New York, and does hereby determine and establish the said routes as follows, and does hereby adopt a general plan of construction of the said railway, the routes of which are herein provided, and does in such general plan hereby adopted, show, as follows, the general mode of operation and such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon:

24

Routes.

One route as follows: Its centre line shall commence at a point at or near the intersection of Broadway with Park row; thence under Park row and Centre street to a point at or near its intersection with New Elm street as proposed; thence under New Elm street, as proposed, to Lafayette place; thence under Lafayette place to Eighth street; thence acrossand under Eighth street, and thence under private property lying between Eighth and Ninth streets and east of the westerly side or line of Lafayette place, produced to Fourth avenue; thence under Fourth avenue and Park avenue to Forty-second street; thence turning from Park avenue into Forty-second street, and taking for the purposes of the curve, if necessary or convenient, private property at the southwest corner of Park avenue and Forty-second street; thence under Forty-second street to Broadway; thence under Broadway to Fifty-ninth street; thence under the Boulevard to a point at or near One hundred and twenty-fourth street; thence by viaduct along and over the Boulevard to a point at or near One hundred and thirty-fourth street; thence under the Boulevard and Eleventh avenue to a point on Eleventh avenue, situate north of One hundred and ninetieth street, and distant therefrom not less than one thousand and not more than one thousand five hundred feet, and thence under or over (as may be most convenient) private property to a point at the southeast end of Ellwood street near Hillside street, and thence over Ellwood street to Kingsbridge avenue or Broadway; thence over Kingsbridge avenue or Broadway, as now proposed, to Riverdale avenue, and thence easterly over Riverdale avenue to a point within five hundred feet of the present Kingsbridge station of the New York and Putnam Railroad Company.

This route shall include a loop at the City Hall park which
25 shall connect with the portion of the route aforesaid along Centre street at or near the south end of that street, and thence proceed westerly and southerly under City Hall park and Broadway, and thence easterly to again connect with the portion of the route aforesaid in Park row. All of the said loop shall lie under City Hall park, Park row, between the south end of Centre street and Ann street, and the portion of Broadway adjoining the City Hall park lying between Vesey and Murray streets. This route shall also include suitable tracks and connections from the City Hall loop to the post-office, such tracks and connections being under the City Hall park and under the portion of Park row between the south end of Centre street and Ann street. This route shall also include suitable tracks and connections from the portion of the route near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station. All of the tracks and connections last mentioned shall be under Park avenue and Forty-second street and private property to be acquired. By private property in this description is meant property not forming part of the streets of the city of New York and not belonging to the city of New York.

Also a route as follows: Its centre line shall diverge from the route aforesaid on the Boulevard, between a line parallel to and one hundred feet north of One hundred and third street and a line parallel to and one hundred feet south of One hundred and third street; thence under private property to a point in One hundred and fourth street; thence under One hundred and fourth street to and across Central park, west; thence under Central park to the intersection of Lenox avenue and One hundred and tenth street; thence under Lenox avenue to a point near One hundred and forty-second street; thence curving to the east and passing under private property, One hundred and forty-third and One hundred and forty-
26 fourth streets, to the Harlem river at or near the foot of One hundred and forty-fifth street; thence under the Harlem river and private property to East One hundred and forty-ninth street at or near its intersection with River avenue; thence under East One hundred and forty-ninth street to a point near its intersection with Third avenue; thence with a curve to the left and under Third avenue to a point near its intersection with Westchester avenue; thence with a curve to the right to and under Westchester avenue, and thence by viaduct over and along Westchester avenue to the Southern boulevard; thence over and along the Southern boulevard to the Boston road, and thence over and along the Boston road to Bronx park.

Plan of Construction.

The general plan of construction of the road is as follows:

For the route under Park row and the said loop at City Hall park, two parallel tracks; for the route from the point of connection of the City Hall loop with the route aforesaid at the southerly end of

Centre street to the junction at or near One hundred and third street and the Boulevard, four parallel tracks; for the route from the junction at or near One hundred and third street and the Boulevard to the New York and Putnam Railroad Company's station at Kingsbridge, two parallel tracks; for the route from the junction at or near One hundred and third street and the Boulevard to Bronx park, two parallel tracks.

All of the above mentioned tracks shall be placed on the same level, except that wherever required by special necessities of surface or sub-surface structures or other special or local necessities and for the purpose of avoiding grade crossings at the southerly end of Centre street and the One hundred and third Street junction, any one or more of the tracks may be depressed below the level of the other tracks to a depth of not more than twenty feet.

27 The tracks shall be of standard gauge, that is to say, of a width of four feet and eight and a half inches between the rails.

There shall be twelve and a half feet width in the tunnels and on the viaducts for each track, except that at stations, switches, turnouts, curves and crossovers the width may be increased to the extent permitted by the width of the tunnel. The tracks wherever passing over or under the street shall be placed over or under the central part of the street, except that no tunnel or viaduct or any wall or part thereof under or along a street, shall, except at the stations, station approaches, curves, and at places of access to subsurface structures, as hereinafter provided, be within a distance of five feet of the exterior line or side of the street. The tracks shall in all cases be placed in tunnels, except only that on the west side route on the Boulevard at or near One hundred and twenty-fourth street the tracks shall emerge from the tunnel and be carried upon a viaduct along the Boulevard to a point at or near One hundred and thirty-fourth street and there be taken again into tunnel, and except also that on the west-side route at a point at or near One hundred and ninetieth street the tracks shall again emerge from the tunnel and be carried upon a viaduct over private property and the above-mentioned streets to the Kingsbridge station, and except also that on the east side from a point on Westchester avenue at or near Bergen avenue the tracks shall emerge from the tunnel and be carried upon a viaduct over and along Westchester avenue and the other streets above-mentioned to Bronx park.

Wherever the tracks change from tunnel to viaduct, or from viaduct to tunnel, the change shall be so made as to occupy or obstruct the use of the surface of the street to the least possible extent consistent with the proper gradient for the tracks.

The roof of the tunnel shall be as near the surface of the street as street conditions and grades will permit. The tunnel shall
28 not be less than thirteen feet in height in the clear. The maximum widths of the tunnel in the clear shall be as follows:

For the route under Park row and the City Hall Park loop, thirty-eight feet; for the route from at or near the south end of Centre

street and to the commencement of New Elm street, fifty feet; for the route from, at or near the commencement of New Elm street to Lafayette place, sixty-eight feet; for the route from, at or near the commencement of Lafayette place to the junction at or near One hundred and third street, fifty feet; for the west-side route from the junction at or near One hundred and third street to Kingsbridge station, twenty-five feet; and for the east-side route from, at or near the junction at One hundred and third street to Bronx park, twenty-five feet; except that wherever the nature of the streets necessitates a curve that an additional width of tunnel may be added not exceeding three feet for each track, and except that on Fourth avenue, from Thirty-second street to Forty-third street, the permissible width shall be sixty-five feet; and for the tunnel beneath the Harlem river and its approaches, the permissible width shall be thirty-five feet. At each cross-street where accommodations for pipes, wires, sewers and other subsurface structures have been provided within the tunnel, the tunnel may, in order to provide convenient access to such pipes, wires, sewers and other subsurface structures have, within the limit of the sides or exterior lines of such cross street or such lines produced an additional width on each side of the route not to exceed fifteen feet, and the area of additional width on either side not to approach nearer than twelve feet to either side or exterior line of such cross street. Footways between the tracks shall be provided the whole length of the line and accommodations arranged for the convenience and protection of employees.

29 Whenever necessary for the proper support of the street surface, the roof of the tunnel shall be of iron or steel girders with brick or concrete arches supported by iron or steel columns and masonry walls, or the roof should be a masonry arch. Viaducts shall be built with a width of twelve and one-half feet for each track and with an additional width of three feet on each side for outside footways. Viaducts may be built of metal or masonry or of both.

Adjacent tracks shall be connected by necessary and suitable switches and connections, and an additional track for siding accommodation may be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the side of the tunnel shall not, by the enlargement of the tunnel for that purpose, be brought within five feet of the exterior line or side of the street.

Along Elm street, wherever the tunnel shall be in the clear not less than sixty-eight feet wide, the pipes, wires, sewers and other subsurface structures shall be placed in suitable galleries in the tunnel at the outside of the exterior tracks. But any such pipes, wires, sewers and other subsurface structures may be placed in suitable galleries beneath the tracks, or such pipes, wires, sewers and other subsurface structures may be placed in the ground above or at the sides of the tunnel, or at the outside of the exterior tracks, and whenever so placed beneath the tracks, or in the ground above or at the sides of the tunnel, the width of the tunnel on New Elm street shall not be

more than fifty feet. Pipes, wires, sewers and other subsurface structures shall, at any part of the said routes, be removed or disturbed only when necessary for the construction and operation of the railway, and, if removed or disturbed, shall be placed under the streets in such manner and in such location that the use and service thereof shall not be impaired. Such pipes, wires, sewers and other subsurface structures shall be left or shall be so arranged as to give free access for their repair or alteration, or for the placing with them of new pipes, wires, sewers and other like structures, and for making connections between the same and buildings at any time.

30 Stations and station approaches shall, in general, be at the intersection of streets and shall be built under, or, if the position of the tracks so require, over, the streets and immediately adjoining private abutting property or through private property to be acquired for the purpose, or both under or over streets and through private property as aforesaid, except that on the Boulevard, stations and station approaches may be in the centre of the street. The streets under or over which stations or station approaches shall be built may include cross-streets, but no part of any cross-street shall be used for a station or station approach at a distance greater than seventy-five feet from the exterior line or side of the street of the route. The word "street," wherever used herein, shall include an avenue or public place.

Along the Boulevard there may be openings in the surface of the street from the tunnel for the purpose of ventilation and light; such openings shall be guarded by convenient and ornamental inclosures. The openings shall not exceed twenty feet in width and fifty feet in length. No two openings shall be within fifty feet of each other. No opening or part thereof shall be within the limits of, or opposite to, any street intersecting the Boulevard; and within the distance of any one block on the Boulevard between any two adjacent crossing streets there shall not be more than two such openings.

The general mode of operation shall be by electricity or some other power not requiring combustion within the tunnels or on the viaducts, and the motors shall be capable of moving trains at a speed of not less than forty miles per hour for long distances, exclusive of stops.

The manner of construction shall be by tunneling or open excavation; it is further

Resolved That plans be prepared to show the route and

31 general plans in so far as they are hereby adopted, which said plans, when formally adopted, shall be deemed to be incorporated herein and to form a part hereof.

Resolutions of February 4th, 1897.

Resolved, That this Board of Rapid Transit Railroad Commissioners for the City of New York hereby adopts the drawings now produced and numbered from 1 to 60, both inclusive, as showing the route and general plan adopted by resolution of this board on Jan-

uary 14th, 1897, and that as provided in the said resolution the said drawings be deemed incorporated in and to form part of said resolution; and it is further

Resolved That the said route and general plan with the said drawings, and the said resolution of January, 1897, be, and they hereby are, adopted by this board.

32 SCHEDULE B.

Report to the Common Council.

Office of the Board of Rapid Transit Railroad Commissioners for the City of New York, No. 256 Broadway, New York city.

To the honorable the common council of the city of New York:

The Board of Rapid Transit Railroad Commissioners for City of New York, constituted by and according to the provisions of chapter 4 of the Laws of 1891, as amended by chapters 102 and 556 of the Laws of 1892, by chapters 528 and 752 of the Laws of 1894, by chapter 519 of the Laws of 1895, and by chapter 729 of the Laws of 1896, has duly considered and determined whether it is for the interests of the public and of the city of New York that a rapid-transit railway or railways for the conveyance and transportation of persons and property should be established therein, and has determined that a rapid-transit railway in addition to those already existing is necessary for the interests of the public and of such city, and by the concurrent votes of six members of the board has determined and established the routes and general plan of construction thereof, and hereby transmits to your honorable body a copy of its plans and conclusions as adopted, including such routes and general plan of construction.

First. The said commissioners, immediately after their respective appointments, severally took and subscribed the oath of office prescribed by law, which said oaths are filed in the office of the clerk of the city and county of New York. This board organized by the election, on the eighth day of June, 1894, of Alexander E.
33 Orr to be its president, and on the 28th day of June, 1894, of John H. Starin to be its vice-president, and of John Claflin to be its treasurer. The board duly framed and adopted by-laws and established rules and regulations for the proper exercise of the powers and duties conferred upon the board. It adopted a seal, and has kept a record of its proceedings, which at all reasonable times has been open to public inspection. This board has, since its organization aforesaid, conducted the inquest and investigation necessary in the premises as to whether it were for the interest of the public and the city of New York that a rapid transit railway or railways for the conveyance and transportation of persons and property should be established therein; and this board did thereupon on the

14th day of January, 1897, determine as aforesaid that such a railway, in addition to those already existing, was necessary.

Second. On or about the 9th day of May, 1895, this board transmitted to your honorable body a certain report and communication, together with certain resolutions of this board adopting plans and conclusions and prescribing routes and general plan for a rapid transit railroad in the city of New York, and also certain drawings or exhibits showing the said routes and general plan. The said plans, conclusions, routes and general plan were subsequently and prior to the sixth day of June, 1895, approved by your honorable body, by the mayor of the city of New York, by the park department of the city of New York, and by the commissioner of street improvements of the twenty-third and twenty-fourth wards of the city of New York. The said routes and general plan were not consented to by the owners of a majority in value of the property abutting upon the streets proposed to be occupied by the said routes, and thereupon the said routes and general plan were presented to the general term of the supreme court on or about the 14th day
34 of June, 1895, for its consent in lieu of the consent of the said property owners. Thereupon, pursuant to law, the said general term appointed Frederick R. Coudert, George Sherman and William H. Gelshenen as commissioners to determine whether the railroad so proposed upon the said routes and general plan ought to be constructed. Thereafter the said commissioners duly determined that such railroad ought to be constructed; and such determination was duly reported to the appellate division of the supreme court for its confirmation. Thereupon and on or about the 3d day of June, 1896, said appellate division refused to confirm said determination or to consent to the said routes and general plan. Desiring to obviate the objections made by the appellate division to the said routes and general plan so formerly proposed, this board has further considered the same and has concluded and determined, in lieu of all such routes and general plan, all of which have been duly rescinded, to adopt, and has adopted, the routes and general plan herewith submitted. The same are set forth in the resolution duly adopted by this board on the 14th day of January, 1897, and the further resolution duly adopted by this board on the 4th day of February, 1897, copies of which resolutions are annexed to this report as a part thereof. This board hereby submits for your consideration the routes and general plan of construction mentioned in the said resolutions for a rapid-transit railway for the conveyance and transportation of persons and property in the city of New York in addition to those already existing, and also the drawings, numbers 1 to 60, both inclusive, mentioned in the said resolutions.

Third. This board, in reaching the conclusions and preparing the plans which it has thus adopted, has considered a very large amount of information and arguments submitted to this board and its members by many citizens and by distinguished experts, as well as the information derived through the personal observation and investiga-

tion of the members of the board. In addition to the infor-
35 mation received by the board and its investigation which are set out in the report of this board to your honorable body on or about the 9th day of May, 1895, this board has been aided by the prolonged investigation before the said commission, consisting of Messrs. Coudert, Sherman and Gelshenen. That commission sat from 18th December, 1895, to the 26th February, 1896, and examined a great number of witnesses, including many distinguished engineers and citizens of New York. Their report, together with the testimony taken by them, was submitted to the appellate division prior to its refusal to confirm or consent, as mentioned in the second paragraph of this report. The grounds for the refusal by the appellate division of its consent were principally as this board understands, the cost of the rapid transit road then proposed, which including a very large allowance for contingencies, was to be between $49,000,000 and $50,000,000 and its proposed occupation of Broadway with the elements of doubt and danger, real or supposed, attending such occupation, and especially the doubtful elements of cost incident to the construction of a four-track tunnel with pipe galleries occupying substantially the entire width of Broadway from the city hall to Twenty-third street.

Fourth. The cost of the rapid transit railroad now proposed upon the routes and general plan now submitted to your honorable body will not, in the opinion of this board, reached by this board after careful consideration (including the cost of all real estate required to be taken in fee), exceed thirty-three million- of dollars, being less by twenty-two millions of dollars than the statutory limit of fifty-five millions of dollars. No part of Broadway is to be taken south of 42d street; and there is no part of the proposed road which involves elements which are unusual in engineering or involve material doubt as to cost or any material outlay incident to
36 the care of the buildings on abutting property. The road is to be in tunnel except for a distance of about 2,800 feet at Manhattan valley and at the extreme northern portion of the route where streets are to be occupied by viaducts.

The uptown terminus of the route on the west side is to be over 2½ miles north of 185th street, which was the uptown terminus of the west-side route formerly proposed to your honorable body. The uptown terminus of the east side route now proposed is more than 3⅞ miles to the north and east of 146th street, which was the uptown east-side terminus of the rapid transit road formerly proposed. The rapid transit board is informed and has every reason to believe that the extensions of the rapid transit railroad now proposed to the north of the Harlem river have the general approval of the citizens of that part of the city as constituting as nearly a complete solution for them of the rapid transit problem as existing conditions permit. The proposed road is to be in tunnel, as near the surface of the street as street conditions permit, except at the crossing of Manhattan valley, and except besides at the extreme northern parts of the east and west routes.

All the board said in its former report made to your honorable body in behalf of the general plan of construction then proposed is applicable to the general plan now proposed, except only that the difficulties and cost incident to construction on Broadway have been obviated, and except that the extreme northern portions of the road are to be upon viaducts rather than in tunnel.

Fifth. The principal features of the plan of construction are these:

1. The tracks are to be placed substantially upon a level.

2. The railway is to be placed as near the surface as street conditions will permit. This renders the road more accessible to
37 passengers than would any other plan of construction. At nearly all of the stations, except the very few stations on the extreme northern portions of the road where the road is to be upon viaduct, the platforms will be reached by stairways much shorter than the shortest stairways providing access to the present elevated railroads, both on account of grades and because, in going down to a railroad, the passenger reaches the platform before the tracks are reached, whereas, on the elevated roads the platforms are reached by climbing higher than the tracks.

3. The total depth of excavation necessary for the construction of the railroad and its foundation will be in general only about twenty feet. There is no portion of the road now proposed where construction, conducted with most ordinary care, involves any risk whatever to neighboring buildings.

4. The method of construction proposed by the board is neither experimental nor untried. The work will be attacked at as many points along the route as may be desirable. The progress of construction will be expedited to the utmost, and the discomforts and delays resulting therefrom reduced to the minimum.

5. The railway tracks are to be of standard gauge, and the railway cars will be large and commodious.

Sixth. This board has refrained for the present from extending the route from the city hall under Broadway to the South ferry. The board learns that there is a strong sentiment among owners of property on lower Broadway and of owners throughout the entire section of the city south of the southern terminus of the road as now proposed, in favor of the extension to the South ferry, and that some of them are endeavoring to secure the assent to the extension of the owners of a majority of the property abutting on lower Broadway. If the effort succeed the board will feel itself bound to
38 consider the question of establishing a route to the South ferry.

In witness whereof, this board has caused its official seal to be hereto affixed, and these presents to be witnessed by its president and secretary this fourth day of February, one thousand eight hundred and ninety-seven.

[L. S.] A. E. ORR, *President.*

LEWIS L. DELAFIELD, *Secretary.*

39 *Affidavit of Anderson H. Tyson.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and Ira A. Shaler, Defendants.

STATE OF NEW YORK, *County of New York,* } *ss:*

Anderson H. Tyson, being duly sworn, deposes and says:

I reside in the county of Essex, in the State of New Jersey. I am by profession a civil engineer, and I am a member of the American Society of Civil Engineers. I have been engaged in the active practice of my profession for over twenty years, and during that time have had a very considerable experience in connection with tunnel work and excavations in city streets, particularly in the city of New York. I have been employed on railroads and water works construction; also by the Metropolitan Street Railway Company
40 in connection with the work of cable construction on Lexington avenue and Columbus avenue of this city; I was also for one year chief engineer for the firm of J. D. & T. E. Crimmins, contractors, who were largely engaged in the work of sewer construction and street improvements, and for six years last past I have had charge of the excavation work for Charles T. Wills, a well-known builder in this city.

At the request of the plaintiff herein I have made several examinations of the work of tunnel construction now in progress by the contractors for the rapid transit railway under the surface of Park avenue between Thirty-fourth and Forty-second streets.

The first of such examinations was made in the month of March, 1902, directly after the occurrence of the caving in of the east side of the surface of Park avenue, between Thirty-seventh and Thirty-eighth streets, which had caused an undermining and settling of the front walls of several dwellings on that block. I subsequently again examined the work on the 3d and 12th days of June, 1902. Upon the east side of the tunnel my investigations were confined to that part of the work between Fortieth street and the lower side of Thirty-eighth street, although on the westerly side of the tunnel I went through the entire length of the work between Thirty-fourth and Forty-first streets. On the occasion of these examinations I took various measurements to learn the dimensions of the tunnel at various points as then completed or in process of construction.

I have further examined the so-called "routes and general plan" adopted by the board of rapid transit railroad commissioners, by resolution dated January 14th, 1897, and February 4th, 1897, and certain drawings described therein as "drawings 1 to 16," and forming a part thereof, said routes and general plan being, as I am informed, those that were thereafter submitted to the appellate division of the supreme court and approved by said court.

41 I have also examined certain so-called "contract drawings" prepared in connection with the contract between the Board of Rapid Transit Railroad Commissioners and John B. McDonald, entitled "Contracts for construction and erection of rapid transit railroad, with supplemental agreements, dated February 21st, 1900," which said drawings are referred to in chapter 2, page 56, of a printed copy of said contract, procured, as I am informed, from the office of the chief engineer of said board.

From my examination of the various drawings aforesaid, and from my investigations and measurements taken on the work I have prepared a diagram, hereunto annexed as a part of this affidavit, upon which I have indicated the surface of Park avenue at its intersection with Thirty-eighth street, showing the location of the east and west building lines and the east and west curb lines thereof.

I have indicated on the said diagram the relative locations under the surface of the said Park avenue of (1) the proposed rapid transit tunnel, as shown upon said "drawings, Nos. 1 to 60," forming part of the routes and general plan, the same being marked "A," "B" and "C," and indicated upon my said diagram in blue ink; (2) the location of the proposed rapid transit tunnels as shown by the so-called "contract drawings," the same being marked "D" and "E." The proposed tunnel "E" (which has not been excavated) is indicated in red ink; and (3) the location of the easterly rapid transit tunnel as now in process of construction under Park avenue, the same being marked "F," and indicated in black ink, as is also the existing westerly tunnel under Park avenue before described as "D."

The tuunel shown by "drawings Nos. 1 to 60," and marked on my diagram "A," "B" and "C," was a single tunnel containing four parallel tracks under the central part of the said Park avenue, and lying below a tunnel then and now existing under the surface of

42 said avenue and occupied by the tracks of the Metropolitan Street Railway Company. The location of said existing street-railway tunnel is designated on the said diagram as "G." According to the plan of said tunnel "A," "B" and "C," there was was a width of about 59 feet between the interior or finished surface of the walls of the tunnel, and a width of about 65 feet between the exterior surface of the walls thereof. The exterior surface of the easterly wall of said tunnel "C" was distant 37½ feet from the building or house line of Park avenue.

By the so-called "contract drawings" it appeared that so much of the route of the tunnel as passed under Park avenue from Thirty-fourth to Forty-second streets was to consist of two tunnels instead of a single tunnel; that said two tunnel were not to be under the cen-

tral part of said Park avenue, but instead thereof the exterior walls of each of the two said tunnels was to be located about 2 feet nearer the curb line, the easterly line of said easterly tunnel being shown to be distant 35 feet from the easterly building line of Park avenue.

As shown upon said "contract drawings," each of the two said tunnels was to be of the width of 24 feet between the interior or finished walls. I ascertained by measurement, however, that, as completed, the westerly tunnel marked "D" is, as a matter of fact, 25 feet between the interior or finished walls.

The easterly tunnel "F," now in process of construction, is not being constructed in accordance with the plan shown either on said "drawings 1 to 60" or said "contract drawings." The exterior wall thereof is being excavated to a point about 25 feet nearer the street or building line of said Park avenue than the easterly wall of the easterly tunnel shown on the "contract drawings" marked "E," and 27½ feet nearer said street or building line than the easterly line of the tunnel "C." The easterly line of the excavation of said easterly tunnel will, when completed, be within 7 feet of the house or street line on the easterly side of Park avenue. The distance
43 between said extreme easterly line and the extreme westerly line of the westerly tunnel will be in all 97 feet 5 inches.

At the time of my examination in March I observed the character of the soil under the surface of Park avenue in the immediate neighborhood where it was undermined, as hereinbefore stated. I found it to consist, near the building line, of disintegrated micaceous gneiss, a material of slight bearing capacity and of such unstable character as to be easily displaced, when partially disturbed, by any weight that may be upon it. I was satisfied at that time that if the work of excavation was continued by the contractor along the line at which he was then working and in the same manner it would almost inevitably result in serious damage to the buildings erected upon the easterly side of Park avenue. None of the concrete lining at that part of the work had been done, although preparations therefor had been made at about Fortieth street, and footings for the side walls had been put in place. The practice of tunnel driving in material of this kind, without immediately following it up with a lining, so as to retard any movement of the superincumbent material, is unusual.

As I am informed, the work of construction was suspended shortly after the accident at the request of the property owners, and was only recently resumed. It was in progress at the time of my recent visits in June. I then noticed that many precautions had been taken by the contractor by means of shoring up the soil with timbers and braces, so as to avoid the possibility of further movement. I am not willing to say, however, from my experience, that the work, even as carried on at the present time, is free from possibility of danger. Certainly there is much more liability of injury to the buildings and annoyance to the occupants from blasting, and much

44 greater risk from vibration after the tunnel shall have been completed than there would have been had the excavation been made, instead of as at present, either along the line shown on the contract drawings or as indicated on the "drawings Nos. 1 to 60" adopted as aforesaid in the routes and general plan.

At the request of Mr. Arthur H. Masten, one of the solicitors for the complainant herein, I inspected the tunnel in front of Mr. Barney's house, on the 19th day of August and found that for a distance of eight (8) feet south of the northern line of the property it had been blasted out to the full width of the tunnel or about to a clear width of 15′ 6″ east of the center line, work had been done for a distance of about seven (7) feet more, leaving about three feet of material to be removed to secure the full width on that side. Holes had been drilled along the eastern line of the tunnel and were ready to be charged and fired. This line is about seven (7) feet west of the foundation wall of the Barney house.

At that point deponent found the rock to be of the same general character as that I found on my first inspection in March last, referred to in my affidavit herein. That on the 7th day of August, 1902, at the request of the attorneys for Mrs. Arabella D. Huntington, I made an inspection of said tunnel and made a report on the same, which said report was embodied in an affidavit made by me and which I am informed was used on a motion made by Mrs. Huntington in this court for a preliminary injunction, restraining the defendant herein from further prosecuting the work on said tunnel in said Park avenue.

ANDERSON H. TYSON.

Sworn to before me this 23rd day of August, 1902.

FORSYTH WICKES,
Notary Public (*No.* 141), *New York County.* [SEAL.]

(Here follows diagram marked page 45.)

46 *Affidavit of Forsyth Wickes.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and Ira A. Shaler, Defendants.

SOUTHERN DISTRICT OF NEW YORK, *County of New York,* } ss.:

Forsyth Wickes, being duly sworn, says that he is an attorney and counsellor at law, and managing clerk for Masten & Nichols, solicitors for Charles T. Barney, the complainant in this suit. That Mr. Barney is now traveling in Europe and will not return to this country for several weeks. That on the 17th day of June, 1902, and just before his departure for Europe, Mr. Barney made an affidavit which was used on a motion in the supreme court of the State of New York, which motion was made by Mr. Barney in the capacity of a tax payer, to restrain the defendants herein from further prosecuting the work of the construction of the easterly tunnel
47 under Park avenue between Thirty-second and Forty-first streets. That said motion has not yet been determined and deponent is informed and verily believes that the said affidavit is now in the hands of the judge before whom the motion was heard. That deponent has a true copy of the same, which affidavit after reciting the fact that he is the owner of the property on the north east corner of Park avenue and Thirty-eighth street in the borough of Manhattan and State of New York, proceeds as follows:

The property was for many years owned and occupied by my father, the late Ashbel H. Barney, from whose estate I acquired it. I have lived in the house over thirty years, and it is my desire to continue to occupy it. It is not in the market for sale, although I have had numerous offers to purchase it on very advantageous terms.

I am the owner of a large amount of real estate situated in various portions of the borough of Manhattan, and have been for this reason interested in the development of the rapid transit system. In the year 1897, when the consent of property owners was requested to the route and general plan of construction of the rapid transit railroad, adopted by the board of rapid transit commissioners by resolutions of January 14th and February 4th, 1897, I signed such consent as the owner of the property upon Park avenue above described. I cannot at this date recall whether I learned of the extent to which

it was proposed to use and occupy Park avenue through the newspapers or through the medium of a circular which, as I am informed and believe, was sent out to property owners, with the proposed consent, at the time when such consents were solicited. I do, however, recall with certainty that before signing such consent I was satisfied, from the information which I had obtained from one source or the other, that the proposed tunnel was to be constructed under the tracks of the Metropolitan Street Railway Company then existing in the street, and that such construction was to be in the cen-
48 tre of the street, instead of at either side thereof, and that the most easterly track was to be more than thirty (30) feet distant from my building line.

In the month of April, 1901, I had in contemplation the erection of an extension to my residence, and making of various alterations and improvements therein, involving the expenditure of considerable money. By this time the work of tunnel construction was in progress in Park avenue, in the vicinity of my house, and, before proceeding to the completion of the proposed improvements, I desired to satisfy myself that there was nothing in the existing conditions attending the construction of the tunnel which would make it inadvisable for me to carry on the work. I accordingly applied to Mr. John B. MacDonald, the rapid transit contractor, for information as to exactly what he was doing or proposed to do in that part of the tunnel adjacent to my premises, and in reply I received from him a letter, of which I hereunto annex a copy, accompanied by a diagram, also presented herewith. As it did not appear from this diagram that the tunnel would be constructed on any lines making its most easterly end nearer than thirty (30) feet to my building, I proceeded to complete the alterations and improvements on my house at an expense of upwards of $200,000. It was not until March, 1902, that I learned that the tunnel was in fact being constructed on lines wholly different from those specified on the plans of the rapid transit commission and the diagram sent me by Mr. McDonald, and that, instead of the tracks being under the central part of the street, there were two tunnels, one on either side of the Metropolitan railroad tracks, and that the location of the eastern track had been moved twenty-seven (27) feet, or thereabouts, to the eastward of the point shown on said plans and diagram, and was, as I am informed, within seven (7) feet of the line of the foundation of my house, instead of over thirty (30) feet distant therefrom. This information I
49 derived from investigations made by engineers employed by myself and others to examine the tunnel after the occasion, in March last, when several houses on the east side of Park avenue, in the block below me, were undermined, and the front parts thereof fell down.

As I am informed and believe, this change in the route of the tunnel adjacent to my premises was made solely by the authority and direction of the chief engineer of the rapid transit railroad commission. It was never formally submitted to or adopted by the said board; no notice of such change was given to the public or to any

property holder, nor was it ever submitted to or approved by the court or any commission appointed by the court. Had I supposed that this tunnel at this point was to be constructed on the lines according to which it is now being built, I should certainly never have given my consent, and I should also have opposed such plans before the court and the commission, for the reason that I regard the plan as now being carried on to be one that is likely to seriously injure my property and render it both unsafe and undesirable to occupy. I am informed by the engineer employed by me to examine the premises that the present lines of the excavation bring the east wall of the tunnel as excavated to within two feet of the line of the foundation of my bay window, and, as already stated, within seven feet of the line of my foundation, and that any shifting, no matter how slight, is likely, at least, to cause serious cracks and possibly more grave danger. The soil in front of my house is of the same general character as that in front of the houses on the block below, where the recent accident has occurred. Moreover, my house is more than ordinarily susceptible to injury, in case of any caving in of the surface of the street, for the reason that as it fronts upon the side street, the beams of the house run from east to west instead of north and south; consequently should the front of the
50 house settle to any appreciable extent, it would have the effect of weakening or destroying the entire structure. As to the extent to which I shall be annoyed by the vibration caused by trains, I can, of course, form no accurate idea until the tunnel is constructed, but am satisfied that the chance of damage from vibration is very much increased by the change of the route of the tunnel to a point twenty-seven (27) feet nearer my house line than it was originally.

That the foregoing is a correct extract from said affidavit of Mr. Barney, and annexed hereto are true copies of the letter and map referred to in said affidavit.

FORSYTH WICKES.

Sworn to before me this 23rd day of August, 1902.

MORRIS U. ELY,
Notary Public, Kings County. [SEAL].

Ctf. filed in N. Y. Co.

51 *Copy of Letter Referred to in the Foregoing Affidavit.*

"NEW YORK, *April 10th*, 1901.

"Charles T. Barney, Esqr., 71 Broadway, New York, N. Y.

"DEAR MR. BARNEY: Your letter of the 9th inst. at hand, and in compliance with your request I send you a section of the rapid transit railroad, as it will be opposite your house—northeast corner of Park avenue and 38th street. In all probability the headings from 34th street and 41st street will meet at about 38th street, and I

would say that your location would not be reached at any rate, before January 1st, of next year.

"In reference to the matter of vibration I have, of course, no data as far as this work is concerned, but during the building and early operation of the tunnel in Baltimore, I made tests with a vibrating needle, the result of which showed that an ice wagon or beer truck running over the streets caused a greater vibration than a train of Pullman cars or coal cars running through the tunnel.

"I will be pleased to give you any further information that you may request.

"Sincerely yours,

"(Signed) JOHN B. McDONALD."

(Enclosure.)

(Here follows diagram marked p. 52.)

53 *Affidavit of Forsyth Wickes.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS, ETC., Defendants.

STATE OF NEW YORK, *County of New York*, } ss.:

Forsyth Wickes, being duly sworn, deposes and says:

I am attorney at law in the office of Masten & Nichols, the attorneys for the plaintiff in the above action. I have examined a copy of the printed papers on the application for an order for the appointment of commissioners entitled "In the matter of the application of the Board of Rapid Transit Commissioners for the City of New York, for the appointment of three commissioners to determine whether a rapid transit railway or railways for the transportation of persons and property, as determined by said board, ought to be constructed and operated," which said printed papers were filed in the appellate division of the supreme court, first department, by Messrs. Parsons, Shepard & Ogden and Tracy, Boardman & Platt, the attorneys for said Board of Rapid Transit Cammissioners hereinafter referred to as the "board." Said printed papers contain copies of the resolutions
of said board of January 14th, and February 4th, 1897,
54 adopting routes and a plan of construction for the said rapid
transit railway which said routes and general plan of construction are particularly set forth therein. The copies of said resolutions annexed to the foregoing complaint and entitled "Schedule A," are correct copies of said resolutions as contained in the said printed papers examined by me. The said printed papers contain also a copy of the report of the said board to the common council of the city of New York, and the copy of said report annexed to the foregoing complaint entitled "Schedule B," is a correct copy of said report as contained in said printed papers examined by me. The said printed papers contain copies of the papers and form of consent enclosed by said board to property owners. The papers enclosed as aforesaid consisted of copies of the resolutions of said board of January 14th, and February 4th, 1897, together with a blank form of consent of which the following is a correct copy:

To the Board of Rapid Transit Commissioners for the City of New York:

Referring to the routes and general plan of construction adopted by said board on the 14th day of January, 1897, and the resolution of February 4th, 1897, and to the plans and conclusions trans-

mitted by said board to the common council of the city of New York, under date of February 4th, 1897, the undersigned, owner of property, known as —— in the city of New York, does hereby consent to the construction of a rapid transit railway in the city of New York, according to said routes, general plans of construction, plans and conclusions transmitted, as aforesaid, by the board of the common council of the city of New York.

Dated —— —, 1897.

55 (Form of acknowledgment.)

The circular, signed by the board and addressed to property owners (of which a copy is set forth at page 52 of said printed papers) contains the following statement: "The board is now seeking to ob-"tain, if possible, the consents of the property owners, along the line "of the routes, to the construction of the railway in accordance with "such plans and conclusions; and the board now asks you to con-"sent as one of such property owners."

I have also examined the record of the minutes of the meetings of said board, printed under its direction. The minutes of March 29th, 1902, on page 1438, contain a letter from William Barclay Parsons, chief engineer, to Hon. A. E. Orr, president of the board, dated March 29th, 1902, reporting upon the collapse of an eastern tunnel of the rapid transit railway beneath the east side of Park avenue between Thirty-seventh and Thirty-eighth streets. The following is a true copy thereof:

NEW YORK, *March* 29, 1902.

Hon. A. E. Orr, president rapid transit board.

SIR: In the prosecution of the work on section 4, in driving the east tunnel under Murray hill, a sliding of the rock composing the sidewall and roof has resulted in a damage to Nos. 51, 53, 55, 57, 59 and 61 Park avenue.

This fall of rock began at 6.10 p. m., on March 19, when a portion of the rock composing the east side of the heading roof in the east tunnel fell, followed shortly afterwards by strip of rock about 40 feet in length, 4 feet in height and 8 wide, sliding into the tunnel along the easterly line of the excavation on one of the beds forming a joint between the strata.

56 The subcontractor, Mr. Ira A. Shaler, at once concentrated his force and began putting in temporary supports to hold the roof from further slides. At 8 a. m. on March 21 the material, which was behind the rock that had previously fallen, broke away, crushing the timbers that had been put in, and making a hole which extended to the surface and into which the stoop and area of No. 55 Park avenue sank. The building department and a private firm of shorers were at once notified by the sub-contractor, who immediately began propping the front walls of No. 55.

At 1:45 p. m. on the same day the front wall of No. 55, as high up as the second story, fell, together with the stoop and portion of

the front wall of No. 57, and at 3:15 the rest of the front wall of No. 57, up to the second story, and the stoop of No. 59, followed. The break at the surface at that time extended from the north wall of No. 53 to the stoop of No. 59. There were a few small cracks in the fronts of Nos. 53 and 59.

At 5 p. m. on March 22 further cracks appeared in the front wall of No. 59, when steps were at once taken to support this building. On March 24 it was decided by the contractors to underpin the front walls of Nos. 51 and 61, which, up to that time, had not been damaged, except two small cracks in the front wall of the former, and to build beneath the front walls of these buildings a new foundation wall down to solid material. The slipping of the ground indicated that none of these buildings was founded on rock.

Since the accident the contractors have been engaged in shoring up the ground below so as to prevent any further caving in, in which they have been successful. The void caused by the caving in was filled with earth during the night of March 21 so as to prevent, as far as possible, any further movement of the ground
57 above. The work of shoring, underpinning and supporting the remaining walls and roofs of the tunnel has been in active progress both night and day, and so far has been successful in restricting the damage to the above-described buildings. The care of the buildings themselves since the accident has been under the jurisdiction of the department of buildings.

Very truly yours,

(Signed) WM. BARCLAY PARSONS,
Chief Engineer.

The said minutes of March 29th, 1902, also contain a statement of certain question- addressed to said board by F. W. Devoe representing certain property owners along the line of Park avenue, among which were the following:

"(2.) Why was the location of the easterly tunnel changed?

"(3.) How far has it been shifted from its original position?

"(4.) Has the westerly tunnel been changed and to what extent?

"(5.) Was the change of position of the easterly tunnel previously approved by the rapid transit commissioners, as required by the construction contract, and, if so, at what date?

"(18.) It is stated by the engineer that the easterly side of the easterly tunnel is about eight feet from the line of the house foundations. Was this near approach to the foundations of buildings known and approved by the rapid transit commissioners?"

The minutes of April 10th, 1902, contain a statement addressed to Hon. Alexander E. Orr, president of the board, and signed by Messrs. Parsons, Shepard & Ogden, Messrs. Boardman, Platt & Soley and Mr. William Barclay Parsons (being respectively the counsel and chief engineer of said board), purporting to be in
58 answer to the questions above referred to, and in the course of said written statement occurs the following:

"18. * * * This particular near approach to a position verti-

cally under the foundations of buildings was not specifically known to or approved by the rapid transit board and for the reason that it was one of a vast number of details with which it is quite impossible for the board to deal, except by trusting them to high-class experts."

Also the following:

"2, 3, 4 and 5. There has been no change in the routes or general plan, or of the contract between the city and the rapid transit contractor with respect to either division of the tunnel under Park avenue. The routes and plan, and the contract allowed the contractor and the engineers reasonable latitude in determining the precise position of any part of the tunnel so that it might accord with the necessities of stations, curves and other local conditions. Among other local conditions on Park avenue is the ultimately anticipated connection of the rapid transit system with the Grand Central station facilities which must, of course, be accomplished without grade crossings. This would include the anticipated extensions of the rapid transit system north to serve the section of the city lying east of Central park. The positions originally given for the tunnel, or both of its sections, were typical and subject to reasonable variations as expressed above. The contractor claims that the matter is largely one for engineering experts; and it is the clear opinion of the contractor and his engineers, as well as the engineer of the board, that the easterly section of the tunnel substantially conforms with the
59 original requirements. The same is true of the westerly section of the tunnel. No modification of the construction contract has been made; and in the opinion of the engineers with whom, in the execution of the work, the determination of technical problems must naturally rest, both sections of the tunnel have been placed according to the fair requirements of the contract."

It appears from said minutes, page 146, that the statement from which the foregoing extracts are made was sent to Mr. Devoe, as the answer of the board to the questions submitted to him as aforesaid.

I have also obtained from the office of the engineer of the said board copies of the drawings described in the resolutions of the said board of January 14th and February 4th, 1897, as "Drawings 1 to 60;" also the copies of the drawings, entitled "Contract drawings A1 to A35," and "C1 to C36," being a part of the drawings prepared in connection with the contract between the board and John B. McDonald, entitled "Contract for construction and operation of rapid transit railroad, with supplementary agreements, dated February 21st, 1900," and referred to in chapter 2, page 56, of the aforesaid contract; also copies of the contract, entitled "Contract for construction and operation of rapid transit railroad, with supplementary agreements, and dated February 21st, 1900," and said copies so obtained by me are the copies that have been used in the preparation of the papers in this action.

The minutes of April 10, 1902, contain a statement addressed to Hon. Alexander E. Orr, president of the board and signed by Messrs.

Parsons, Shepard & Ogden, Messrs. Boardman, Platt & Soley and Mr. William Barclay Parsons (being respectively the counsel and chief engineer of the board) purporting to be in answer to the questions above referred to. In the course of said statement occurs the following:

"(8.) The rapid transit contract between the city and Mr.
60 McDonald has not been assigned so far as the board is advised. The consent of the board is necessary to the validity of the assignments, and the board has given no consents."

"(13, 14, and 15.) The rapid transit board has not exacted any security from the sub-contractor; nor is the city in any way concerned with such security, except only that the city has taken from its own contractor, Mr. McDonald, an assignment of all the sub-contractor's bonds as additional security to the city for the performance of the rapid transit contract. The board, in behalf of the city, required from the contractor a bond for construction and equipment in the penal sum of $5,000,000, and also a "continuing bond" in the penal sum of $1,000,000. The condition of the latter bond is that the contractor shall "faithfully perform all the conditions, covenants and requirements" specified in the contract. The contractor has also deposited with the city the sum of $1,000,000, which the contract provides shall be security "for the faithful performance by the contractor of all the covenants, conditions and requirements specified and provided for in the agreement for construction." These securities aggregate in amount $7,000,000. In addition the contract provides that the city shall have a first lien upon the entire equipment of the railroad to be provided by the contractor, such lien to be "further security for the faithful performance by the contractor of the covenants, conditions and agreements" of the rapid transit contract. The contractor by such contract has covenanted with the city that the plans and specifications and other provisions of the contract, if the work be done without fault or negligence on the part of the contractor, do not involve any danger to the foundations, walls or other parts
of adjacent buildings or structures. And the contractor
61 further covenants that he will at his "own expense make good any damage that shall in the course of construction be done to any such foundations, walls or other parts of adjacent buildings or structures." This provision makes it clear in our opinion that the contractor is bound to make good all harm done *to the buildings on Park avenue*. The contract further provides that the contractor is bound to complete the entire work upon every section of the road "with the highest regard to the safety of life and property." The contract further provides that "the sidewalks, curbs, areas and stoops along the line of the work must also be protected from any injury; but should any injury occur to any sidewalk, curb, area or stoop, the contractor shall fully restore the same to as good a condition as existed before the injury was done." The contract further provides that "in case any claim shall be made by any person or corporation against the city for loss or damage to person or prop-

erty caused by any negligence, fault, or default of the contractor, the comptroller shall, upon the requirement of the board, deduct from any moneys due or becoming due to the contractor the amount of the claim as security for its payment.

"We have no reason to suppose that the contractor or sub-contractor will for a moment fail in willingness or readiness to make good the damage done to the Park Avenue proprietors by the recent accident. But if the contractor or sub-contractor shall fail to make good such damage, the provision of the contract, the securities mentioned above and the moneys which may be withheld by the city from the contractor, in our opinion assure beyond any possible doubt the payment of all proper claims."

"(1, 17, 18, and 20.) The rapid transit board has done
62 everything within its power to prevent further injury to the buildings on the east side of Park avenue between Thirty-seventh and Thirty-eighth streets. All of these buildings are now in charge of the building department. The board believes the tunnel underneath to be safe. For abundant caution all work has for some time been suspended except the construction of permanent masonry lining and the placing of additional temporary supports. The whole situation is being examined by engineering experts."

On or about the 18th day of June of this year, a so-called taxpayer's action (under chapter 531 of the Laws of 1881 as amended) was instituted in the supreme court for New York county by Charles T. Barney against the said board, the members thereof as commissioners of rapid transit, John B. McDonald and Ira A. Shaler.

The bill of complaint in the present suit and the supporting affidavits, so far as they set forth the departure of the plan of construction of the said rapid transit railway as now being carried on under Park avenue from the routes and general plan as contained in the said resolutions of January 14th and February 4th, 1897, are substantially identical with the papers in that action. I have examined the affidavits submitted by the defendants in said action in opposition to a motion for a preliminary injunction therein and ascertained that the facts set forth in the plaintiff's said papers are practically undisputed. No decision on that motion has yet been handed down. The affidavit of William Barclay Parsons, Esq., chief engineer of the said board, contains the following statements with regard to the modification of the plan of construction under Park avenue:

"I understood that the board approved of that mode of construc-
63 tion on Park avenue. My directions were given without any notice to the board or consultation with it. I believed and assumed that so long as the tunnel and its various sections were kept within the central part of the street bounded on each side by a line parallel with and five feet distant from the side, the precise location was a mere matter of engineering to be determined by myself as the expert in chief part for the rapid transit board with due regard to all the various requirements of the problem.

"The routes and general plan contain a drawing for a part of the

route under Park avenue showing three tunnels or sections of tunnel with a tunnel width out to out of at least 65 feet. A cross-section on this plan is annexed to this report as Exhibit A. The written description contained in the general plan, describing the construction for the part of the route in question, permitted a width of 65 feet in the clear. Of the three tunnel sections, the center one was originally intended to contain two tracks, and was located beneath the Metropolitan tunnel, while the outer ones were originally intended to contain one local track each. But this was tentative or illustrative only, and was not intended to limit the engineer's choice of the most eligible location so long as the structure did not reach within five (5) feet of the house line on either side, and as long as the aggregate widths of the tunnel sections in the clear did not exceed sixty-five (65) feet. When the time came to prepare the contract drawings, it was decided to build two instead of three tunnel sections, each section to contain two tracks, and each to have a width in the clear of 24 feet, and a total over-all width of 27 feet each, or a total occupation of street of 54 feet. It was proposed to separate these sections by a core of rock and masonry of 17 feet in
width. This intermediate space could have been utilized for
64 any purpose to which subsurface space is put, such as an additional subway track, or a double decking of the Metropolitan tunnel, or the laying of a sewer, gas or water main, or similar structure." (Fols. 27 to 29.)

And again Mr. Parson- states that the exterior wall of the tunnel where the caving-in occurred upon the easterly side of Park avenue will be four feet in thickness, and continues:

"Even at this point the back of the wall will be six feet from the building line, so that the provision of the general plan that the tunnel shall not approach within five feet of the building line has been followed." (Fol. 34.)

S. L. F. Deyo, Esq., chief engineer of the said Rapid Transit Construction Company, states in his affidavit as follows:

"As I understand the matter, Mr. Parsons began studying the situation with a view to so changing the detail at that point as to enable the connections above mentioned to be made without the necessity of grade crossings, and in order to accomplish this, I am informed that the detail of construction was altered in that the tunnel sections on Park avenue were separated so as to permit of three inside depressed tracks running into the Grand Central station. This plan placed the easterly tunnel section as it is now building. After such change in detail was made, Mr. Parsons sent an altered drawing to me with directions that the road should be built as laid down upon such altered drawings." (Fols. 9–10.)

The affidavit of Alexander E. Orr, president of the said board,
states that at a meeting of the board held on June 25th, 1902,
65 "in order to put beyond any doubt the view of the board with respect to the mode of construction under Park avenue, the board, with the concurrence of the mayor and comptroller of the city, formally adopted resolutions as follows:

"Whereas, the chief engineer has reported to this board that the rapid transit tunnel under Park avenue between 34th and 42nd streets has been and is being constructed by the contractor John B. McDonald, in two divisions, a westerly and an easterly division, of which the construction and the location are shown upon a plan and drawings this day submitted to the board entitled 'Park Avenue construction, plans submitted to the Board of Rapid Transit Railroad Commissioners, 25th June, 1902,' and filed with the secretary; and

"Whereas, the chief engineer has stated to the board the necessity and reason for the construction of such part of the rapid transit tunnel in the manner shown by such plan and drawings and it appears from the report of the chief engineer that the construction of the portion of the tunnel between 34th and 42nd streets is in much the larger part actually completed according to such plan and drawings; and

"Whereas, the city has already in large part paid for such construction of such portion of the said rapid transit tunnel.

"Now, therefore, it is

"Resolved, That this board approve and confirm the details of the mode of construction and location of the said tunnel under Park avenue between 34th and 42nd streets as shown by such plan and drawings so submitted by the chief engineer and directs that such construction be completed in accordance with such plan and drawings." (Fols. 15–17.)

66 This affidavit is made in support of an application for a writ of injunction enjoining and restraining the defendants and each of them, their agents and servants and all persons claiming under or through them during the pendency of this action from excavating or blasting or doing any act toward the construction of a rapid transit railway in the said Park avenue, and for such other and further relief as to the court may seem proper.

FORSYTH WICKES.

Subscribed and sworn to before me this 23d day of August, 1902.

MORRIS U. ELY,
Notary Public, Kings County. [SEAL.]

Certificate filed in N. Y. Co.

67 (Endorsed:) Circuit court of the United States, in and for the southern district of New York.—Charles T. Barnet, complainant, against The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants.—Bill of complaint and affidavits.—Masten & Nichols, solicitors for com-

plainant, 49 Wall St. borough of Manhattan, city of New York.—U. S. circuit court, southern district of New York, Filed Aug. 25, 1902, John A. Shields, clerk.

68 Circuit Court of the United States in and for the Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

Whereas, in the above-named cause it has been made to appear upon the verified bill of complaint and the schedules annexed thereto, and the affidavits of Forsyth Wickes and of Anderson H. Tyson, filed herein, that a writ of injunction preliminary to the final hearing is proper and that *prima facie* the complainant is
69 entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed;

Now, on motion of the complainant, it is ordered that the defendants appear before a judge of this court at room 124 in the Post-office building in the borough of Manhattan in the city of New York upon the 3rd day of September, 1902, at 12 o'clock noon of said day, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue, and it appearing to the undersigned circuit justice of the second circuit that there is danger of irreparable injury being caused to the plaintiff before the application for the said preliminary writ of injunction can be heard, unless the said defendants, pending such hearing, be restrained as hereinafter set forth:

Now, therefore, it is ordered, that you, the said City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. MacDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants herein, and each of you, your agents and servants, and all persons claiming under or through you, be and you hereby are specially restrained and enjoined until the further order of this court, from excavating or blasting or doing any act toward the construction or completion of a rapid transit railway in the borough of Manhattan of the said city of New York, under or upon Park avenue in the easterly half thereof in front of the complainant's premises at the northeast corner of Park avenue and 38th St.

It is further ordered that a copy of this order, certified unto by the hand of the clerk and seal of this court, be served on each of the defendants to be restrained thereby.

Dated August 23rd, 1902.

E. HENRY LACOMBE,
Circuit Justice of the Second Circuit.

(Endorsed:) Circuit court of the United States, in and for the southern district of New York.—Charles T. Barney, complainant, against The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased.—Defendants.—Restraining order and order to show cause.—Masten & Nichols, solicitors for complainant, 49 Wall street, borough of Manhattan, city of New York.

I hereby certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon Charles E. Fraser, engineer in charge of the rapid transit work from 34th street to 41st street on the east side of Park avenue, — the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant Board of Rapid Transit Railroad Commissioners for the City of New York, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said board, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant John B. McDonald by exhibiting to De Lancey Nicoll, of the firm of Nicoll, Anable & Lindsay, attorneys for said defendant, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at
71 the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, by exhibiting to Charles P. Howland, of the firm of Howland, Murray & Prentice, as attorneys for said defendant, the within original and at the same time leaving with him a copy thereof.

WILLIAM HENKEL,
United States Marshal, S. D. N. Y.

New York, August 25th, 1902.

U. S. circuit court, southern district of New York, Filed Aug. 26, 1902, John A. Shields, clerk.

72 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY
vs.
RAPID TRANSIT COMMISSIONERS ET AL.

LACOMBE, *C. J.:*

The stay heretofore granted is vacated—see opinion in Huntington case.

August 27, 1902.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—Barney *vs.* Rapid Transit Commissioners.—Memo. opinion,—Lacombe, J.—U. S. circuit court, southern district of New York, Filed Aug. 28, 1902 , John A. Shields, clerk.

73 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house and post office building, in the county of New York, on the 11th day of November, 1902.

Present: Hon. E. Henry Lacombe, United States circuit judge.

CHARLES T. BARNEY
versus
THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT Railroad Commissioners for the City of New York, *et al.*

Upon reading the order, entered herein on the 15th day of October, 1902, dismissing the bill of complaint herein, and upon all the papers and proceedings upon which the said order was granted, and upon all the other proceedings herein, and upon the certificate of the Hon. E. Henry Lacombe, United States circuit judge, granted pursuant to the second paragraph of the fifth section of the act of Congress, approved March 3rd, 1891, and entitled, "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes;" and upon reading and filing the defendants' notice of motion herein, dated the 3rd day of November, 1902, for an order resettling the form of the said certificate, and after
74 hearing Edward M. Shepard, Esq., in support of the said motion, and Arthur H. Masten, Esq., in opposition thereto, and due deliberation having been thereupon had, it is

Ordered that the said certificate be, and the same hereby is, resettled and modified, so that the same shall read as follows:

"United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

A final decree having been entered herein on the 14th day of October, 1902, dismissing this suit and the bill of complaint therein:

Now, therefore, this court in pursuance of the second paragraph of the fifth section of the act of Congress, approved March 3, 1891, and entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause, as follows:

Is this court without jurisdiction of this cause for the reason that the acts of the defendants in building and constructing the easterly portion of the tunnel in Park avenue in the city of New York were not acts of the State of New York, to which the prohibition of the fourteenth amendment of the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty or property without due process of law' has application?

E. HENRY LACOMBE,
U. S. Circuit Judge."

Nov. 11th 1902.

E. HENRY LACOMBE, *U. S. C. J.*

75 Please take notice that a proposed order, of which the within is a copy, will be presented for settlement to the Hon. E. Henry Lacombe, at his chambers in the United States court house and post office building in the county of New York, on the 11th day of November, 1902, at 4 o'clock in the *fore*noon.

Dated, New York, November 10th, 1902.

EDWARD M. SHEPARD,
BOARDMAN, PLATT & SOLEY,
Solicitors for the Defendants, Board of Rapid Transit Railroad Commissioners and Others, 26 Liberty Street, New York City, N. Y.

To Messrs. Masten & Nichols, solicitors for complainant. Hon. George L. Rives, corporation counsel, solicitor for def't The City of New York.

[Endorsed:] U. S. circuit court, southern district of New York. Charles T. Barney *versus* The City of New York, The Board of Rapid Transit Railroad Commissioners for the City of New York, *et al.* Order, with notice of settlement. Original. Edward M. Shepard, Boardman, Platt & Soley, solicitors for def't The Board of Rapid Transit R. R. Commissioners for the City of New York, *et al.*, 26 Lib-

erty street, New York city. A copy of the within paper has been this day received at the office of the corporation counsel. Nov. 11, 1902. George L. Rives, corporation counsel. Due and timely service of the within proposed order with notice of settlement is hereby admitted this 11th day of November, 1902. —— ——, solicitors for complainant. U. S. circuit court southern district New York Filed Nov. 11 1902 John A. Shields, clerk. Copy this day received Nov. 11 1902 Masten & Nichols.

76 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants. } Petition for Appeal.

To the United States circuit court for the southern district of New York:

Your petitioner, Charles T. Barney, respectfully represents that he is aggrieved by the final decree entered in this cause on the 14th day of October, 1902, dismissing this suit and the bill of complaint therein, on the ground that this court had no jurisdiction of this cause.

Your petitioner therefore prays an appeal from said final decree of October 14th, 1902, to the Supreme Court of the United States, under the second paragraph of section 5 of the act of Congress approved March 3, 1891, and entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," and files herewith an assignment of error and prays that his appeal may be allowed and a supersedeas granted to the end that the said final decree herein of October 14th, 1902, may be reviewed and reversed.

October 17th, 1902.

MASTEN & NICHOLS,
Solicitors for Complainant and Petitioner,
49 *Wall Street, New York.*

77 (Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, against The City of New York, etc. defendant.—Petition for appeal.—Masten & Nichols, solicitors for complainant, No. 49 Wall St. Manhattan, city of New York.—U. S. circuit court, southern district of New York, Filed Oct. 17, 1902, John A. Shields, clerk.

78 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

Charles T. Barney, the complainant above named, conceiving himself aggrieved by the final decree entered herein on the 14th day of October, 1902, dismissing the suit and the bill of complaint therein, does hereby appeal from said decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said appeal was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York city, October 14th, 1902.

MASTEN & NICHOLS,
Solicitors for Complainant and Appellant,
49 Wall Street, New York.

And now, to wit, on October 17th, 1902, it is ordered that the appeal be allowed as prayed for.

E. HENRY LACOMBE,
United States Judge.

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs.* The City of New
79 York, etc., defendants.—Order allowing appeal. Masten & Nichols, solicitors for complainant, 49 Wall St. Manhattan, New York city.—Received this 18th day of October, 1902, a copy of the within order allowing appeal, service of which is hereby admitted. Howland, Murray & Prentiss, att'ys for def't Shaler.—Copy received Oct. 18, 1902, Boardman, Platt & Soley, per J. T. C.—Copy received Parsons, Shepard & Ogden, Oct. 18, 1902.—A copy of the within has this day been received. Oct. 18, 1902, Nicoll, Anable & Lindsay.—A copy of the within paper has been this day received at the office of the corporation counsel. Oct. 18, 1902, George L. Rives, corporation counsel.—U. S. circuit court, Filed Oct. 18, 1902, John A. Shields, clerk.

80 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

Now comes Charles T. Barney, by his solicitors Masten & Nichols, and prays an appeal to the Supreme Court of the United States from the final decree entered herein on the 14th day of October, 1902, and

says that in the record and proceedings in this cause there is manifest error, in this:

That the circuit court of the United States for the southern district of New York erred in entering the said final decree upon its own motion, upon the ground that it was required to dismiss this cause, because it appeared to its satisfaction that this suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, for the reason that the acts of the defendants in building and constructing the easterly portion of the subway tunnel in Park avenue, in the city of New York, were not the acts of the State of New York, but were the individual acts of the defendants to which the prohibitions of the fourteenth amendment of the Constitution of the United States had no application.

Wherefore, the said Charles T. Barney prays that the said
81 decree of this court, dated October 14th, 1902, be reversed and that this cause be remanded for such further proceeding as equity and justice may require.

MASTEN & NICHOLS,
Solicitors for Complainant and Appellant,
49 *Wall Street, New York.*

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs.* The City of New York, etc. defendants.—Assignment of errors.—Masten & Nichols, solicitors for complainant, 49 Wall street, Manhattan, New York city. U. S. circuit court, southern district of New York. Filed Oct. 17, 1902, John A. Shields, clerk.

82 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants. } Bond on Appeal.

Know all men by these presents, that we, Charles T. Barney, as principal, and The American Surety Company of New York, of 100 Broadway, borough of Manhattan, New York, as surety, are held and firmly bound unto The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as executrix of the estate of Ira A. Shaler, deceased, in the full and just sum of five hundred (500.) dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the southern district of New York in a suit in equity pending in said court between Charles T. Barney, complainant, and The City of New
York, Board of Rapid Transit Railroad Commissioners for
83 the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as executrix of the estate of Ira A. Shaler, deceased, defendants, a final decree was entered against the said Charles T. Barney, dismissing said suit with costs, and the said Charles T. Barney having appealed from said final decree and his appeal having been allowed, and the said Charles T. Barney having filed a copy thereof, together with an assignment of errors in the clerk's office in the said court to reverse the final decree in the aforesaid suit, and a citation directed to the defendants therein citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 30th day of November, 1902.

Now the condition of the above obligation is such that if the said Charles T. Barney shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation be void, else to remain in full force and effect.

This is a bond to operate as a supersedeas.

CHARLES T. BARNEY. [SEAL.]

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,

By DAVID B. SICKELS, *Vice President.*

SAMUEL S. PERRY, *Attorney.*

Sealed, executed and delivered in the presence of
FORSYTH WICKES.

84 STATE OF NEW YORK, }
County of New York, } ss:

On this 17th day of October, 1902, before me personally appeared Charles T. Barney, to me known and known to me to be the individual who executed the foregoing instrument, and he acknowledged to me that he executed the same for the uses and purposes therein set forth.

FORSYTH WICKES,

[SEAL.] *Notary Public, No.* 141, *New York County.*

STATE AND COUNTY OF NEW YORK, ss:

On this 17th day of Oct. 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose

and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Samuel S. Perry, and knew him to be one of the attorneys of said corporation, that the signature of said Samuel S. Perry subscribed to the said instrument,
85 is in the genuine handwriting of the said Samuel S. Perry and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

[SEAL.] MARSHALL L. BROWER,
Notary Public, New York County.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted.

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Samuel S. Perry, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and
86 do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 17th day of Oct. 1902.

[SEAL.] SAMUEL S. PERRY, *Attorney.*

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the surety company under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Oct. 17, 1902, John A. Shields, clerk.

87 UNITED STATES OF AMERICA, *ss:*

To the City of New York, etc., etc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the 13th day of November, next pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the southern district of New York, wherein Charles T. Barney is appellant and you are appellees, to show cause, if any there be, why the final decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of October, in the year of our Lord one thousand nine hundred and two.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs* The City of New York, etc. defendants.—Citation.—Masten & Nichols, solicitors for complainant, 49 Wall St. Manhattan, New York.—Received this 18th day of October, 1902 a copy of the within citation service of which is hereby admitted. Howland, Murray & Prentiss, att'ys for def't Shaler.—Copy received, Oct. 18, 1902, Boardman, Platt &
88 Soley, per J. T. C.—Copy received. Parsons, Shepard & Ogden, Oct. 18, 1902.—A copy of the within has this day been received. Oct. 18, 1902. Nicoll, Anable & Lindsay. A copy of the within paper has been this day received at the office of the corporation counsel. Oct. 18, 1902, George L. Rives, corporation counsel. U. S. circuit court, southern district of New York, Filed Oct. 18, 1902, John A. Shields, clerk.

89 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled Charles T. Barney, complainant-appellant, *vs.* The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit; John B. McDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants-appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 12th day of November, in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

90 [Endorsed:] United States circuit court of appeals for the second circuit. Charles T. Barney, appellant *vs.* The City of New York *et al.* appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

91 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Complainant, *against* THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, and The Rapid Transit Subway Construction Company, Defendants.	In Equity. No. —.

STATE OF NEW YORK, *County of New York, Southern District of New York,* } *ss.:*

Alexander E. Orr, being duly sworn, says: I am a member of the Board of Rapid Transit Railroad Commissioners for the City of New York (hereinafter called the board), and have been since its
92 reorganization in 1894, with the exception of a few days between the termination of my membership therein as president of the Chamber of Commerce and my reappointment as a permanent member of the board. Except during that time and for a few days thereafter, I have been president of the board from 1894. I have given to the rapid transit problem of the city very large and continuous attention since 1894; and before that time I was greatly interested in it.

The location of the easterly tunnel section under Park avenue of the rapid transit railroad now in course of construction, of which the plaintiff complains in this suit, is, in my opinion, necessary to

the connection with the Grand Central station required by the present routes and general plan of the railroad, and, besides, is necessary to the suitable east side extension of the railroad. I shall speak first of such east side extension.

In 1895 the board adopted routes and general plan for a rapid transit railway in the boroughs of Manhattan and the Bronx, then forming the city of New York. Such routes were intended to provide a general and systematic scheme, the route extending from South Ferry along Broadway to 14th street, where the route subdivided into an easterly and westerly line, the easterly line following Fourth avenue and Park avenue to the Harlem river, and thence across the Harlem river; and the westerly line following Broadway and the Boulevard to Fort George near 186th street on the west side. The board then deemed an east side line to be essential north of 42nd street, and such a line between 42nd street and the Harlem river was to be placed underneath the tracks of the New York Central & Hudson River railroad. The appellate division of the supreme court of the State of New York refused its approval to such routes and general plan, on the ground that the expense of construction might exceed the pecuniary ability of the city or the limit of expense for rapid transit prescribed by law. Thereupon, and in 1897, the board adopted new routes and general plan for the rapid transit railroad which is now under construction and is referred to in the bill of complaint in this suit. The main line of such route extends from
93 the city hall northerly, following Fourth avenue from 14th street to Park avenue, and thence following Park avenue to 42nd street, thence turning to the west to Broadway and following Broadway and the Boulevard northerly to 103rd street, where the route divides into an easterly and a westerly line. The more easterly of the two lines follows Lenox avenue (being near the central north and south line of that portion of the borough of Manhattan) northerly to and beyond the Hudson river. It will be perceived that the routes and general plan of the road now under construction do not include a line on the easterly side of the borough of Manhattan between 42nd street and the Harlem river, where is gathered a very large population. The absence of such a provision in the routes and plan was deeply regretted by the board as a serious defect made necessary by the limit upon expenditure and by the determination of the appellate division. The board has, however, ever since had it in contemplation that before long the necessity of an east side line would be recognized and provision for its construction would be made. The routes and general plan for such an east side line are now in course of preparation under the formal direction of the board, and its adoption by the board will depend only upon the pecuniary provision which the city shall be able and willing to make for rapid transit. In my opinion, and that of the board, such a line must join the line of the present road at or near the junction of 42nd street and Park avenue. The map of the city and of its rapid transit systems put that proposition beyond reasonable doubt. And, moreover, at that point is situate the

Grand Central station, which is the most important point within the city of New York for the receipt and distribution of incoming and outgoing passenger traffic. The total amount of such traffic there is vast.

In devising the present routes and plan the board provided for "suitable tracks and connections from the portion of the route "near the corner of Park avenue and 42nd street to the yard and "tracks of the Grand Central station," and that "all of the tracks "and connections last mentioned shall be under Park avenue
94 "and 42nd street and private property." The entrance of the New York Central & Hudson River railroad, the Harlem railroad and the New York, New Haven & Hartford railroad into the Grand Central station and the vast traffic they bring, make it a matter of very great consequence to the traveling public and to the interests of the city at large that there should be easy communication between the rapid transit system now under construction and the tracks of those three railroads at the Grand Central station. They now do a very important and growing intra-urban business on the east side of the city, as well as a suburban business which is of large consequence to the growth and development of the city and of very great importance to the traveling public. The board from its original consideration of any rapid transit plan deemed it to be important that, as soon as the views of the proprietors of the three railroads should permit, the very best kind of connection between the four tracks of the rapid transit railroad on Park avenue and the tracks of the Grand Central station should be made. For that reason the provision above referred to was inserted in the routes and general plan. Such connections or portions thereof could also, as I have pointed out, be used for the initial part of the eastern extension of the rapid transit railroad from 42nd street and Park avenue.

Prior to March, 1902, the board had adopted no formal resolutions with reference to the precise arrangement of details of the tracks and connections between the route on Park avenue and the Grand Central station. That matter, so far as preparation for it could be made in advance of a definite arrangement with the proprietors of such three railroads, was left to the chief engineer of the board as an expert matter.

It is clear beyond any reasonable doubt that the connections between the four tracks on Park avenue and the tracks of the Grand Central station must be made without grade crossing. Neither public safety nor public sentiment, nor the opinion of the board, would for a moment permit grade crossings at so critical a point of the rapid transit system as the section of the road curving from Park
95 avenue into 42nd street. In my opinion, and in the opinion of the board, the detail of construction on Park avenue which was followed by the chief engineer of the board and assented to by the chief engineer of the contractor and of the Subway Construction Company, were proper and necessary for a safe and efficient connection with the yard and tracks of the Grand Central station, and also for the proposed east side line. The necessary avoidance of grade

crossing involves having seven separate tracks immediately below 42nd street whenever the connection shall be complete. Such avoidance of grade crossing requires that three tracks shall be depressed so as to pass under other tracks, and that those three tracks shall leave the main line tracks coming from the south of Park avenue at a sufficient distance southerly from 42nd street to permit them to be sunk upon proper grades below the tracks under which they must pass.

The attention of the board was particularly drawn to the mode of construction under Park avenue by the accident in the easterly section of the Park Avenue tunnel occurring on 21st March last. A committee of owners of property on Park avenue which was formed to take care of their interests in the matter was received and heard by the board, and addressed to the board a series of questions, some of which are quoted in the affidavit of Gordon M. Buck, included in the complainant's moving papers. The board submitted the questions to its chief engineer and its attorneys and counsel, who, on April 10th, 1902, reported answers to such inquiries. Certain of the answers are correctly stated in such affidavit of Mr. Buck (pp. 51 and 52 of plaintiff's printed moving papers). The answers were transmitted by me to such committee of Park Avenue property owners. The said committee has not expressed to the board or to myself any dissatisfaction with the answers. No further complaint or protest has been received by the board from any member of that committee, and no owner of any property on Park avenue, whether or not represented by such committee, has begun any proceedings or made any protest against the continuance of the work according to the plans now being followed, except only the complainant
96 and one Frederick W. Devoe and one Charles T. Barney.

The said Charles T. Barney began a suit in the supreme court of the State of New York on or about the 18th day of June, 1902. The said Devoe has not begun any suit.

The complainant's premises, on account of which she brings this suit, were conveyed to her on or about the 11th day of July, 1884, by Collis P. Huntington, by deed, a certified copy of which is hereto annexed. This I state upon my information and belief, such information having been given me by such copy of such deed and by the attorneys for the Board of Rapid Trans't Railroad Commissioners. As I am advised by counsel for the said board, Edward M. Shepard, and as I verily believe, the said deed conveyed no part of the fee of Park avenue as the said avenue now exists with its width of 140 feet. As I am informed and believe, the said avenue has so existed with such width of 140 feet and with its easterly and westerly building line in their present positions for upwards of fifty years. As I am informed and believe, the house upon the complainant's premises was built very many years ago, having its easterly side on Park avenue upon the said easterly building line of the avenue as the same has so existed for upwards of fifty years. During such fifty years the said Park avenue, with its width of 140 feet as at present, has been continuously used by the public as one

of the streets of New York. Nor, so far as I know or have heard, has any claim that any part thereof belonged in fee to the complainant or any other abutting owner been ever made, until the claim was made by the complainant in this suit.

At a meeting of the board held on 25th June, 1902, in order to put beyond any doubt the view of the board with respect to the mode of construction under Park avenue, the board, with the concurrence of the mayor and comptroller of the city, formally adopted resolutions as follows:

Whereas, the chief engineer has reported to this board that the rapid transit tunnel under Park avenue between 34th and 42nd streets has been and is being constructed by the contractor,
97 John B. McDonald, in two divisions, a westerly and an easterly division, of which the construction and location are shown upon a plan and drawings this day submitted to the board entitled "Park Avenue construction, plans submitted to the Board of Rapid Transit Railroad Commissioners, 25th June, 1902," and filed with the secretary; and

Whereas, the chief engineer has stated to the board the necessity and reason for the construction of such part of the rapid transit tunnel in the manner shown by such plan and drawings and it appears from the report of the chief engineer that the construction of the portion of the tunnel between 34th and 42nd streets is in much the larger part actually completed according to such plan and drawings; and

Whereas, the city has already in large part paid for such construction of such portion of the said rapid transit tunnel,

Now, therefore, it is

Resolved, That this board approve and confirm the details of the mode of construction and location of the said tunnel under Park avenue between 34th and 42nd streets as shown by such plan and drawings so submitted by the chief engineer and directs that such construction be completed in accordance with such plan and drawings.

In the opinion of the board, and in my opinion, it is beyond doubt that whatever shall be the result of this suit, it will be necessary for the proper rapid transit development of the city that the easterly section of the tunnel on Park avenue of which the plaintiff complains shall remain part of its rapid transit system. If such section were to be now closed and filled in it would in the future, and a future not remote, need to be reopened and reconstructed. If the court were to require the present abandonment of such section it would be necessary to excavate Park avenue for another tunnel section lying to the west. As I am informed by the chief engineer, and believe, the construction of such another section would involve very large expense, not less than six hundred thousand dollars ($600,000), without including the cost of filling up the present eastern tunnel section of which the plaintiff complains. It would, as I am
98 informed by the chief engineer, and believe, involve a prolongation of the period of excavation and construction on

Park avenue of as much as eighteen months, and would involve a delay in the completion and commencement of operation of the rapid transit railroad for as much as one year. The loss and inconvenience to the city and to the traveling public which this would involve would be enormous.

The city of New York has already invested upwards of sixteen million dollars ($16,000,000) in the construction of the rapid transit railroad described in the complainant's bill. I am informed by William Barclay Parsons, the chief engineer of the rapid transit board, and I verily believe, that the construction of a new easterly tunnel section on Park avenue such as would be necessary if the restraining order issued by this court was continued, would seriously delay the completion of the railroad. The railroad is by far the most important public work now under construction in the city of New York. Its total cost, exclusive of equipment will be more than thirty-seven million dollars. Its completion involves enormous considerations of public convenience.

There will be submitted with this affidavit a true copy of the contract between the city and the defendant McDonald, made on 21st February, 1900.

As I am informed and believe, the construction of the easterly tunnel section as it is now proceeding, and as it was proceeding at the time of the issue of the temporary restraining order herein, was rightful, and all of the excavation, blasting and general and other work incidental thereto were also rightful and lawful. As I am informed and believe, and as in substance appears by the complainant's bill of complaint, the complainant learned in March last of the position of the easterly tunnel section of which she now complains, and since that time a very large amount of construction work has been done by the contractor and sub-contractor upon such easterly tunnel section proceeding in pursuance of the contract of 21st February, 1900, between the defendant The City of New York and John B. McDonald. The City of New York has for such work done since March, 1902, paid out a large amount of money. It has made such payments for the large amount of work done during the month of May last, and also a large amount of money for the amount of work done during June last.

99

The allegation of the complainant's bill that each of the defendants is a resident of the southern district of New York is not true. The defendant Edward M. Grout and myself are, and for many years have been, residents of the borough of Brooklyn, in the city of New York, and of the eastern district of New York.

A. E. ORR.

Sworn to before me this 6th day of August, 1902.

[SEAL.]

HERBERT FRAZIER,
Notary Public, N. Y. Co.

This indenture, made the eleventh day of July, in the year one thousand eight hundred and eighty-four, between Collis P. Huntington, of the city, county and State of New York, widower, of the first part, and Belle D. Worsham, of said city, county and State of New York, of the second part,

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, and other good and valuable considerations, the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all the certain lots, pieces or parcels of land in the city of New York, with the buildings and improvements thereon, hereinafter described, viz.:

100 First. All that certain lot, piece or parcel of land with the improvements thereon, situate on the easterly side of Park (or Fourth) avenue, bounded and described as follows, viz.: Beginning at a point formed by the intersection of the southerly line of Thirty-eighth street with the easterly line of Park (or Fourth) avenue; running thence easterly along the southerly line of Thirty-eighth street, eighty feet; thence southerly, parallel with Park (or Fourth) avenue, twenty-five feet; thence westerly, parallel with Thirty-eighth street (and part of the way through the centre of a party wall) eighty feet to the easterly line of Park (or Fourth) avenue; thence northerly along the easterly line of said Park (or Fourth) avenue, twenty-five feet to the point or place of beginning, being the same premises conveyed by Matthew Byrnes and Jane, his wife, to Elizabeth S. Huntington, by deed dated October 15th, 1867, and recorded in the office of the register of the city and county of New York in Liber 1033 of Conveyances, page 188.

Second. All that certain lot, piece or parcel of land, with the dwelling house thereon, known as number 63 (sixty-three) Park (or Fourth) avenue, in the said city, county and State of New York, commencing at a point distant twenty-five feet southerly from the southeasterly corner of said Park (or Fourth) avenue and Thirty-eighth street; running thence easterly eighty feet (part of the way through the centre of a party wall) and parallel with Thirty-eighth street; thence southerly twenty-four feet seven inches parallel with Park (or Fourth) avenue; thence westerly parallel with Thirty-eighth street (and part of the way through the centre of another party wall) eighty feet to the easterly line of said Park (or Fourth) avenue; thence northerly along the said easterly line of Park (or Fourth) avenue twenty-four feet seven inches to the point or place of beginning; being the same premises conveyed by Michael L. Doyle and Anna Maria, his wife, to Elizabeth S. Huntington by deed dated July 31st, 1877, and recorded in the office of the register of
101 the city and county of New York in Liber 1409 of Conveyances, page 331.

Subject, nevertheless, to the covenants and restrictions as to buildings contained in the deed executed by Matthew Byrnes and wife to Susan E. Kerr, bearing date the second day of January, 1867, and recorded in the said office of the register of the said city and county of New York, in Liber 987 of Conveyances, page 648, on the twenty-fourth day of January, 1867, at fifteen minutes past ten o'clock in the forenoon.

Third. All that certain lot, piece or parcel of land, situate, lying and being in the city of New York, bounded and described as follows: Beginning at a point on the southerly side of Thirty-eighth street, distant one hundred feet westerly from the southwesterly corner of Thirty-eighth street and Lexington avenue, running thence southerly and parallel with Lexington avenue, ninety-eight feet and nine inches; thence westerly and parallel with Thirty-eighth street, twenty-four feet and ten inches; thence northerly and parallel with Lexington avenue, ninety-eight feet and nine inches to the southerly side of Thirty-eighth street; and thence easterly along the southerly side of Thirty-eighth street, twenty-four feet and ten inches to the place of beginning; being the same premises conveyed to Elizabeth S. Huntington by deed from Philip Embury, as trustee for Helen Embury, in which Abraham Embury also united, dated August 26th, 1868, and recorded in the office of the register of the city and county of New York, in Liber 1063 of Conveyances, page 453. But subject to the restrictions and covenants against nuisances as fully set forth in a certain indenture between Harriet R. Ogden and other owners of property on Murray hill, and duly recorded in the register's office of the city and county of New York, in Liber 485 of Conveyances, page 594.

Fourth. All that lot, piece or parcel of land and the buildings thereon, situate, lying and being in the twenty-first ward of
102 the city of New York on the southerly side of Thirty-eighth street between Lexington and Park (or Fourth) avenues, and bounded and described as follows: Beginning at a point on the said southerly side of Thirty-eighth street distant one hundred and twenty-four feet and ten inches (124 feet, 10 inches) westerly from the corner formed by the intersection of the westerly line of Lexington avenue and the southerly line of Thirty-eighth street, and running thence southerly and parallel with Lexington avenue, ninety-eight feet and nine inches (98 ft. 9 in.); thence westerly and parallel with Thirty-eighth street, fourteen feet and eight inches (14 ft. 8 in.); thence northerly parallel again with Lexington avenue and part way through a party wall, ninety-eight feet and nine inches (98 ft. 9 in.), to the southerly line of Thirty-eighth street; and thence easterly along the said southerly line of Thirty-eighth street fourteen feet and eight inches (14 ft. 8 in.) to the point or place of beginning; being the same premises conveyed to the party of the first part by deed from Mary Gilbert White and Leonard D. White, her husband, dated June 11th, 1881, and recorded in the office of the register of the city and county of New York in Liber 1611 of Conveyances, page 1.

Subject, nevertheless, to the covenants that the lands between the southerly line of Thirty-eighth street and a line parallel thereto and five feet southerly therefrom shall forever remain an open space or court, contained in a certain agreement between Harriet R. Ogden and others and L. M. Hoffman and wife and recorded in Liber of Conveyances 485, page 593.

And also subject to the covenants as to buildings and nuisances contained in a certain agreement between the said last named parties and recorded in Liber of Conveyances 485, page 594.

And also subject to the covenants as to nuisances contained in a certain deed executed by Susan Ogden and others to William F. Otis and recorded in Liber of Conveyances 341, page 307.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders,
103 rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part and her heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

C. P. HUNTINGTON. [L. S.]

Sealed and delivered in the presence of:
J. F. C. GROW.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this eleventh day of July, in the year of our Lord, one thousand eight hundred and eighty-four, before me personally came Collis P. Huntington, to me known and to me known to be the individual described in and who executed the foregoing conveyance, who acknowledged to me that he executed the same.

J. F. C. GROW,
[L. S.] *Notary Public* (81), *New York County.*

Recorded preceding at request, Charles H. Tweed, July 17th, 1884, at twelve o'clock and twelve minutes p. m.

Witness my hand.

JOHN REILLY, *Register.*

104 NEW YORK, *Aug. 4th*, 1902.

I hereby certify that the foregoing is a true and complete copy of the deed recorded in the office of the register of the city and county

of New York in Liber 1809 of Conveyances, pages 269 to 273, and the whole thereof.

[SEAL.] WM. J. WILSON,
Notary Public, No. 158, N. Y. County.

Register's office, county of New York, State of New York.

I, John H. J. Ronner, register of the said county, have compared the annexed copy with an instrument recorded in this office, on the 17th day of July, A. D. 1884, at 12 o'clock, 12 mins. p. m., in Liber 1809 of Conveyances at page 269, and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, this 6th day of August, 1902.

[SEAL.] JOHN H. J. RONNER, *Register.*

(Endorsed:) United States circuit court, southern district of New York.—Arabella D. Huntington, plaintiff against The City of New York, *et al.* defendants.—Affidavit of A. E. Orr.—Boardman, Platt & Soley, Parsons, Shepard & Ogden, appearing specially as solicitors for defendants for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

105 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, and The Rapid Transit Subway Construction Company, Defendants.
} In Equity. No. —.

STATE OF NEW YORK, }
County of New York, } *ss.:*

William Barclay Parsons, being duly sworn, says:

I am the chief engineer of the Board of Rapid Transit Railroad Commissioners for the City of New York, which I hereinafter call the rapid transit board. I was appointed to be such chief engineer in the year 1894. Prior to that time I was deputy chief

engineer of the rapid transit commission of 1891, and previous to that had been connected in various engineering capacities with three rapid transit companies projecting lines in the city of New York. I have, besides, had a large and general experience in engineering, including railroad construction, bridge construction, mining engineering and in other departments of the engineering
106 profession. Since I have been chief engineer I have made a careful study of the various rapid transit systems of other parts of the world, having made several visits to Europe for that purpose.

In June last I was requested by Alexander E. Orr, the president of the rapid transit board, to make to that board a full statement of the facts related to the construction of the easterly tunnel section under Park avenue, of which the complaint in this suit complains. I made such report to the rapid transit board at its meeting held on the 25th day of June, 1902. The matters stated in such report, so far as they are facts, are within my own knowledge and are true, and, so far as they are opinion, correctly state my opinion, and are stated as the result of my professional knowledge and experience, and more especially my long and very thorough knowledge of the problem of rapid transit construction under Park avenue. Such report is as follows

Hon. Alexander E. Orr, president Board of Rapid Transit Railroad Commissioners.

SIR: Pursuant to your instructions I hereby respectfully report upon the matters relating to the rapid transit tunnel under Park avenue. That portion of the rapid transit tunnel is nearing completion. The mode of construction which has been followed and is now being followed is shown upon the drawings submitted herewith entitled "Report upon the Park Avenue tunnel, 25th June, 1902, A, B, C, D and E." If due regard be had to proper connection of the four tracks under Park avenue with the yard and
107 tracks of the Grand Central station as required by the routes and general plan, or if due regard be had to the divergence from Park avenue of the East Side Rapid Transit line which the board has considered to be inevitable and of the building of which it would seem to be plain that public convenience will not permit long delay,—then the mode of construction which has been followed is, in my opinion, and beyond any question whatever, the best, the most practicable, the safest and the most economical. Indeed, it may be said without exaggeration that it is the only admissible or proper mode of construction.

I directed the mode of construction including the location of the easterly tunnel section of which complaint is made by Mr. Charles T. Barney in his suit just begun. My direction was given with the entire approval and consent of the chief engineer of the contractor, Mr. McDonald, who is also the chief engineer of the Rapid Transit Subway Construction Company.

At the time of our negotiations with the New York Central Rail-

road Company, late in the year 1900, I was asked to prepare plans for the necessary tracks for the connection with the yard and tracks of the Grand Central station. I prepared such plans upon which the tunnel sections on Park avenue were separated so as to permit three inside depressed tracks running into the Grand Central station and avoiding a crossing at grade. This plan placed the easterly tunnel section as it is now building. After the negotiations were temporarily suspended I informally reported to the board my intention to build the easterly tunnel section as it is now building
108 in order that work should not be done which would have to be torn out when the connection with the Grand Central station should be made. I understood that the board approved of that mode of construction on Park avenue. My directions were given without any notice to the board or consultation with it. I believed and assumed that so long as the tunnel and its various sections were kept within the central part of the street bounded on each side by a line parallel with and five feet distant from the side, the precise location was a mere matter of engineering to be determined by myself as the expert in chief for the rapid transit board with due regard to all the various requirements of the problem.

The routes and general plan contain a drawing for a part of the route under Park avenue showing three tunnels or sections of tunnel with a tunnel width out to out of at least 65 feet. A cross-section of this plan is annexed to this report as Exhibit A. The written description contained in the general plan, describing the construction for the part of the route in question, permitted a width of 65 feet in the clear. Of the three tunnel sections, the centre one was originally intended to contain two tracks, and was located beneath the Metropolitan tunnel, while the outer ones were originally intended to contain one local track each. But this was tentative or illustrative only, and was not intended to limit the engineer's choice of the most eligible location so long as the structure did not reach within five (5) feet of the house line on either side, and
109 as long as the aggregate widths of the tunnel sections in the clear did not exceed sixty-five (65) feet. When the time came to prepare the contract drawings, it was decided to build two instead of three tunnel sections, each section to contain two tracks, and each to have a width in the clear of 24 feet, and a total over all width of 27 feet each, or a total occupation of street of 54 feet. It was proposed to separate these sections by a core of rock and masonry of 17 feet in width This intermediate space could have been utilized for any purpose to which subsurface space is put, such as an additional subway track, or a double-decking of the Metropolitan tunnel, or the laying of a sewer, gas or water main or similar structure. A cross-section of the design is attached to this report as Exhibit B.

The reason for making the change in detail from that shown on Exhibit A to that shown on Exhibit B was that the latter form of construction was a safer one than that proposed by the former. The general plan provided as follows:

"This route shall also include suitable tracks and connections "from the portions of the route near the corner of Park avenue and "42nd street to the yard and tracks of the Grand Central station. "All of the tracks and connections last mentioned shall be under "Park avenue and 42nd street and private property."

The general plan also provided:

"The tracks shall be placed under the central portion of the street, "except that no tunnel shall, except at stations, station approaches, "curves and at places of access to subsurface structures, be within a "distance of five feet of the exterior line or side of the street."

110 The other junctions of the tunnel at city hall and 104th street were arranged, as shown by the contract drawings, to avoid any grade crossing by depressing the crossing tracks; for it was recognized that grade crossings would destroy the operating efficiency of the road.

When the working studies for the junction were prepared, it was found that, practically, such junction, to secure the proper result, must be arranged by depressing three tracks beneath the northbound local track and both express tracks, and then by gradually elevating them so as to form a junction with the main line at points between 37th and 35th streets. Under this arrangement a grade-crossingless junction was effected with four tracks. This arrangement is shown in Exhibit C.

The space per track for standard work is 12′ 6″, or 37′ 6″ for the three tracks. If a four-track junction were to be provided the space of 44 feet between the inside of the inner walls of the two tunnel sections to be first constructed (that is to say, the easterly section for the two northbound tracks and the westerly section for the two southbound tracks) must be sufficient to permit the removal of such inner walls whenever the construction of the intermediate tracks should begin; and to replace the same with columns. Besides, a certain amount of additional space above the normal space of 12′ 6″ for tracks would be required to provide

111 for the extra clearance at the curves where each track curves in to its connecting track. When, therefore, the work was actually laid out and the final location was made upon the ground, the westerly tunnel section was located substantially as shown on the illustrative contract drawing, namely, parallel to the axis of the street and distant therefrom 20′ 6″; and the easterly section was located at an angle to the axis of the street with its centre line distant from the centre line of the street 21 feet at 34th street, and then diverging so as to bring it 47′ 6″ from the centre line of the street at about 37th street. Without increasing the width overall it was also decided to make each tunnel 25 feet wide in the clear, being the same width as the rest of the two-track structure. These dimensions left exactly 40 feet in the clear between the outside faces of the inner walls of the two tunnel sections. Two cross-sections, one taken at 34th street, where the two tunnel sections are at a minimum distance apart; and one taken between 37th and 41st streets, where the two tunnels are at the maximum distance apart, are attached

hereto as Exhibits D and E showing the connection between the east side line and the west side line, and the arrangement of the tracks. It is, of course, a physical impossibility to join tracks except with diverging curvature, and with a reasonable gradient for the depressed tracks to rise to the same level as tracks overhead. These requirements bring the point of junction south to the neighborhood of 36th street or as shown in Exhibit C. You will
112 also see by Exhibit C that the inner face of the wall is ten feet from the building line; and that the wall itself is about 18 inches thick, so that the back of the wall will be 8′ 6″ from the building line, except for about fifty feet where the recent land slide occurred, and where there is a wall four feet thick being constructed. Even at this point the back of the wall will be six feet from the building line, so that the provision of the general plan that the tunnel shall not approach within five feet of the building line has been followed.

I am informed that the plaintiff, Mr. Barney, in this suit which has been brought, asks that there be undone what has been done in the way of construction of the easterly tunnel section. I regard this as being impossible unless at a cost of time, money, hardship and expense on the part of the public and on the part of all interested simply unendurable to be contemplated. At least seventy-five (75) per cent. of the excavation for such easterly section of the tunnel has been completed. The total work already done on the easterly sections has cost at least four hundred and fifteen thousand dollars ($415,000), all of which, except twenty-seven thousand dollars ($27,000) has been paid by the city to the contractors. The total expense of completing such tunnel sections ready for operation will not exceed two hundred and twenty thousand dollars ($220,000).
113 The elimination of the easterly tunnel section as now constructed and a substitution for it of a new easterly section set further to the west, would be inconsistent with the routes and general plan in that it would prevent proper connections with the yard and tracks of the Grand Central station. Besides that it would not be safe to leave the present tunnel section in its existing condition, because such an unventilated space might, in the course of time, become filled with gas, and explosion would undoubtedly result. For the same reason it would not be safe to fill it with sand or broken stone, the interstices of which might be filled with gas. The only safe thing to do, therefore, if it must not be completed, would be to fill it with concrete. Such expense would not, in my opinion, be less than two hundred thousand dollars.

The expense of constructing the new tunnel section up to a point corresponding to that reached by the present easterly tunnel section, would be about four hundred thousand dollars; and the time necessarily occupied in constructing the same to that point would be at least eighteen months. During such further time of construction the proprietors of Park avenue would be subjected to annoyance like that to which they have been subjected during the past two years. If this were to be done every practicable precaution known

to the engineering art would be taken to avoid accident or injury; but it is simply impossible for an engineer to give any promise that so difficult and serious a piece of work could be carried through without any accident.

114 In conclusion I beg leave to urge upon your serious attention the great risk that would be taken by stopping the work through an injunction for even a short time. On the east tunnel section the masonry lining has been completed up to 37th street from the south, and to 39th street from the north. The rock in the intermediate portion is partly supported by the debris from the land slide and partly by timber. This rock we now know to be, at this point, an unsafe and treacherous material, and one which decomposes on exposure. The risk, therefore, of allowing this ground to stand without constructing the masonry lining as rapidly as possible as we are now doing is a responsibility which I cannot accept.

The payments heretofore made to the contractor have included payments for excavation, steel and masonry for the east tunnel section between 34th and 42nd streets to the amount of about four hundred and fifteen thousand dollars.

The payments on account thereof have been in several installments. Two of such installments being for large sums of money have been made since the 21st day of March, 1902.

WM. BARCLAY PARSONS,
Chief Engineer.

115 All, or nearly all of the work thus done upon such easterly tunnel section will have been wasted if it shall not be completed in front of the premises of the complainant. If the court should require that such easterly tunnel section be there placed materially to the west of the place in which it is now being constructed, then the work upon the section will have to be done completely anew. And, besides there would be incurred the large expense of filling up or otherwise using or disposing of the easterly tunnel section as now constructed.

The further suspension of work upon such section in front of complainant's premises will be most disasterous and involve a very considerable danger. Such easterly tunnel section proceeding from the south is completely excavated and the arch of solid and permanent mason work completed to a point about one hundred and fifty (150) feet south of the line formed by the construction of the southerly boundary of the complainant's premises across Park avenue. From such point to within about five (5) feet of complainant's line, the excavation for such easterly tunnel section is nearly entirely completed and the solid and permanent mason work for the support of the arch largely in place. Proceeding from the north southerly the excavation is completed and the mason work arch being put in place to the middle line of Thirty-ninth street thence to the line formed by the continuation across Park avenue of the northeriy line of complainant's premises, being a distance of about two hundred and

ninety feet, the excavation has been in large part completed.
116 In front of the complainant's premises the excavation of the easterly tunnel section is one-half finished, as is shown by a vertical cross-section taken there, which is correctly represented upon a drawing, Exhibit F, hereto annexed entitled "63–65 Park Ave., showing relation to present excavation and proposed tunnel." The scale of such map, Exhibit F, is five (5) feet to one (1) inch.

Since the preliminary restraining order was issued herein work has been suspended in front of the complainant's premises, the work at the time being in the condition shown by the drawing Exhibit F. The roof of the excavation is now, and must, during the operation of such restraining order, be supported by timber uprights placed there only for temporary purposes. It is neither proper nor safe to delay longer the secure completion of the masonry work of the tunnel. When that shall have been put in place that portion of the tunnel, and of the street above it, and the abutting property to the east, including the complainant's premises, will be entirely secure. They will not be entirely secure until that time.

The City of New York has already invested upwards of nineteen million dollars in the rapid transit railroad described in the complainant's bill. The construction of a new easterly tunnel section on Park avenue to the extent which would be made necessary in case the place of such section were changed in front of complainant's premises as she proposes would require at least eighteen months
and would delay the commencement of operation of the
117 rapid transit railroad by as much as twelve months.

The complainant's premises as enclosed are eighty (80) feet deep from the easterly side of Park avenue, as such side now exists with the width of the avenue one hundred and forty feet.

Since the 25th day of March, 1902, a large amount of work has been done upon the easterly tunnel section objected to by the complainant herein, and at a large expense to the City of New York.

WM. BARCLAY PARSONS.

Sworn to before me this 6th day of August 1902.

[SEAL.] ROB'T H. HUTCHINS,
Notary Public, N. Y. Co.

(Here follow diagrams marked pp. 118, 119, 120, 121, 122, and 123.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

124 (Endorsed:) U. S. circuit court, southern district of New York.—Arabella D. Huntington, against The City of New York, *et al.*—Affidavit of William Barclay Parsons.—Boardman, Platt & Soley, 35 Wall street, N. Y. city.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city. Appearing specially as solicitors for the defendants for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

125 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Plaintiff,
against
THE CITY OF NEW YORK ET AL., Defendants.

STATE OF NEW YORK,
County of New York, Southern District of New York, } ss.:

William Barclay Parsons, being duly sworn, says:

I have read copies of the letters addressed to Judge Lacombe by the complainant's counsel, two dated the 7th inst. and the third the 8th inst. Such counsel seriously misunderstood what I said to them at their interview with me on the 7th inst. I did not say or mean that, without reference to the restraining order, I would not continue work in front of the complainant's premises, for three weeks. I did say that, unless some weakness were developed in the excavation where the roof is now supported by timber, I should not recommence work for about that period.

I am advised that the restraining order prevents any kind of work for the completion of the tunnel in front of complainant's premises, and does not allow me or the engineers or contractor in charge of the work any exercise of discretion to do work of that character in case physical conditions change, as they may at any time. In my opinion the restraining order will, in case of such change, leave the work in a situation of extreme peril. I respectfully
126 express my hope that the engineer in charge of the work may be left at liberty to act instantly in case any danger shall become apparent, and that, for the safety of all concerned, and as soon as the work can be best practically done, the permanent mason work may be put in place. Until then there will be danger. Props and supports which need daily inspection, or tunnel walls or roof which likewise need daily inspection and will be put at risk by the excavation a short distance away, are a serious menace, which, in my professional opinion, the public safety and the safety of the street and property above (including the complainant's house) require should not continue for a single unnecessary day.

I distinctly stated to complainant's counsel at my interview with them that the work in front of complainant's premises to and in-

cluding the finished permanent mason work could be completed within four weeks, if speeded as it certainly would be if any weakness were to develope. I did say that, if there were no special occasion for haste, the work would normally take about three months to complete the permanent mason work.

I also and at the same interview told the complainant's counsel that the break in the ground (the accident of the rock slip in March last) occurred immediately south of the complainant's property and that the ground immediately to the north and south of the break had undoubtedly been badly strained, and that therefore weakness in the ground immediately in front of the complainant's house was liable to develope at any time. I also told them that only
127 the week before our talk I had, on my personal investigation, discovered some rock in front of the complainant's house which had then cracked.

WM. BARCLAY PARSONS.

Sworn to before me this 11th day of August 1902.

ROBERT H. HUTCHINS,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of N. Y.—Arabella D. Huntington against The City of New York, *et al.*—Further affidavit of William Barclay Parsons verified August 11, 1902.—Boardman, Platt & Soley, 35 Wall St. New York city.—Parsons, Shepard & Ogden, 111 Broadway, New York city.—Solicitors for Board of Rapid Transit Railroad Commissioners, appearing specially for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

128 United States Circuit Court, Southern District of New York.

ARABELLA D. HUNTINGTON
against
THE CITY OF NEW YORK and Others.

STATE OF NEW YORK,
Southern District of New York, } ss:

William Barclay Parsons, being duly and further sworn, says:

I am the chief engineer of the Board of Rapid Transit Railroad Commissioners, and am in general familiar with the situation on Park avenue set forth in the bill of complaint herein. The complainant's house, at the southeast corner of 38th street and Park avenue, as, during the discussion of the situation of Park avenue since the accident in March last, I have been repeatedly informed, and as I now believe, was, prior to the time of such accident, occupied as a boarding house under a lease thereof made by the complainant. I am

also informed and verily believe that, immediately after the accident, the tenant and occupants of the house removed therefrom.

Since the 25th day of March, 1902, the expense of the work done upon the easterly tunnel section objected to by the complainant
129 herein and referred to in folio 35 of the former affidavit made by me herein, and verified on the 6th day of August, 1902, is not less than one hundred and thirty thousand, four hundred and nine dollars ($130,409). Since March, 1902, the city has made payments for construction work upon said easterly tunnel section as follows: For work done during the month of March, four thousand, eight hundred and twenty dollars ($4,820.); for work done during the month of April, forty six thousand, eight hundred and eighty three dollars ($46,883.); for work done during the month of May, thirteen thousand, nine hundred and twenty dollars ($13,920.); for work done during the month of June, twenty-six thousand, five hundred and three dollars ($26,503.) The city of New York is now liable to pay, and during this month will pay, for such work done during the month of July, the sum of thirty thousand six hundred and eighty nine dollars ($30,689.); and from August 1st to August 6th, inclusive, the sum of seven thousand, five hundred and ninety-four dollars ($7,594.).

WM. BARCLAY PARSONS.

Sworn to before me this 19th day of August, 1902.

JAS. HOLLMAN,
Notary Public for Kings County, N. Y.

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of New York.—Arabella D. Huntington against The City of New York and others.—Affidavit of Wm. Barclay Parsons, verified August 19th, 1902.—Boardman, Platt & Soley, Parsons, Shepard & Ogden, solicitors for rapid transit commissioners appearing specially for the purposes of the motion only, 111 Broadway, borough of Manhattan, New York city, N. Y.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

130 U. S. Circuit Court, Southern District of New York.

ARABELLA D. HUNTINGTON
vs.
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners, and Others.

Motion for Preliminary Injunction.

LACOMBE, *Circuit Judge:*

This suit is brought to enjoin the defendants from proceeding with the construction of the so-called rapid transit railroad in front of

complainant's premises on Park avenue, southeast corner of 38th street, "until such time as the city shall have obtained the fee in said avenue;" and, in the event of the city's obtaining such fee, then from constructing such railroad otherwise than in accordance with the route and general plan heretofore approved by the local authorities and by the State court, undertaking under the statute to give consent in lieu of the consent of abutting owners.

The rapid transit act (chapter 4 of the Laws of 1891 as amended) provides that the general plan, which, with a statement of the route or routes, is to be submitted for approval, shall show not only the general mode of operation, but also "such details as to the manner of construction as may be necessary to show the extent to which any street avenue or other public place is to be encroached upon and the property abutting thereon affected." Once approved no
131 change is to be made in the plans without the further consent and authorization of the local authorities and of the abutting owners, or, in lieu thereof, of the State court.

The complainant's brief thus epitomizes the "route and general plan," which was duly approved and under which alone, under the statute, the commissioners have authority to construct. They provided that the proposed railroad should consist of four parallel tracks and should run under Park avenue; that, with certain exceptions not now material, the tracks should in all cases be placed in tunnels, and that the said tracks wherever passing over or under the street should be placed over or under the central part of the street; that, under Park avenue, the width of the tunnel should be fifty feet, with a permissible width of sixty-five feet; that the roof of the tunnel should be as near to the surface of the street as street conditions and grades would permit. Certain drawings, known as 'Drawings 1–60,' illustrative of said 'details of construction' were incorporated into the said general plan as a part thereof. According to the drawings so adopted, it appeared that, under Park avenue at the point in question, there was to be a single tunnel containing four tracks, that the center line of the said tunnel was to be under the center line of Park avenue, and that the extreme width of excavation required was to — 65 feet, or thereabouts thus bringing the exterior surface of the easterly wall of such tunnel to about 37 feet 6 inches from the building line of the houses on the east side of Park avenue." Inspection of the record shows that below the existing tunnel of the existing street railroad there were to be three tunnels, the central one
132 holding two tracks and the eastern and western tunnels one track each. They were to be located centrally and within the space of sixty-five feet above indicated. The general plan further provided as follows "The route should include suitable tracks and connections from the portion of the route near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station. All of the tracks and connections last mentioned shall be under Park avenue and Forty-second street and private property to be acquired. * * * "The tracks wherever

passing over or under the street shall be placed over or under the central part of the street, except that no tunnel or viaduct or any wall or part thereof under or along a street, shall, except at the stations, station approaches, curves, and at places of access to subsurface structures, as hereinafter provided, be within a distance of five feet of the exterior line or side of the street." * * *

"Adjacent tracks shall be connected by necessary and suitable switches and connections, and an additional track for siding accommodation may be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the side of the tunnel shall not, by the enlargement of the tunnel for that purpose, be brought within five feet of the exterior line or side of the street."

The work now being prosecuted at the place in question consists of two tunnels beneath the existing street railroad tunnel. The westerly tunnel is substantially in accord with the general plan as to encroachment upon the avenue and effect upon abutting property; its westerly line is but five feet west of the westerly line
133 shown in the drawing. The easterly tunnel is wholly outside of the sixty-five foot central strip there shown. Its westerly line lies east of the easterly line of the original strip and its easterly line is about seven feet from the building line of the houses on the east side of Park avenue. It encroaches on Park avenue to an extent not shown in the "details as to manner of construction" which the statute provided should be shown to local authorities and to property owners and the court in advance of adoption. That it affects abutting property to an extent greater than was shown is conclusively established by the collapse of the front walls of buildings nearly adjoining complainant's.

All parties are citizens of New York and the complainant contends that this court has jurisdiction because "the Board of Rapid Transit Commissioners has been clothed with authority by the rapid transit act to build a subway, and that, acting under such authority and in the course of constructing the tunnel, it is depriving her of property without due process of law, in contravention of the fourteenth amendment, which provides that no State "shall deprive any person of life, liberty or property without due process of law." The illegal acts complained of are stated to be: "(1) By constructing a railroad under a street, the fee in which is owned by complainant; and (2) * * * by constructing a railroad in accordance with an unauthorized route and general plan of construction and thus wrongfully depriving the complainant of her easements as an abutting property owner and usurping her consent to this unauthorized mode of construction."

134 It is quite correctly contended by complainant that the question of jurisdiction will not be summarily disposed of here. It is properly to be presented by a plea and thus decided under conditions which will permit of its review on appeal. Nevertheless upon a motion for a preliminary injunction the burden is upon the complainant to satisfy the court that there is at least a

reasonable probability of ultimate success upon the question of jurisdiction as well as upon the merits of the controversy.

As to the ownership of the fee of Park avenue at the place in question complainant's contention is based upon the proposition that the city never acquired the fee, because a proceeding duly instituted to open the avenue was never completed by entry of final order. The question thus presented need not be discussed, because, upon the papers now before the court, it is not shown that complainant owns the fee, and, that being so, it is immaterial who does own it. Long after the lines of Park avenue were established on the city map, long after proceedings to open it were instituted and apparently terminated, long after it had been regulated, graded and paved and used for years as a public thoroughfare the complainant bought her property at the corner of 38th St. The deed conveyed to her two lots Nos. 63 and 65 Park avenue described as bounded upon the west by "the easterly line of Park (or Fourth) avenue" and running 80 feet in depth along 38th street, easterly from said line. Upon her rights as abutting owner only can the complainant rely to press this application.

135 It is understood that no complaint is made or relief asked for against the centrally-located triple tunnel of the general plan as affecting her rights. If it were the long delay in applying would preclude the granting of preliminary injunctive relief.

The substantial questions here presented are as to the extent of abutting owner's rights or easements, how far they are property within the meaning of the Constitution, to what extent they are affected, and, if invaded, what is the appropriate remedy. Those points have been exhaustively discussed by both sides but they are not to be considered unless the court is reasonably satisfied that the alleged interference with complainant's rights is an interference by the State. The inhibition of the fourteenth amendment is against action by a State depriving an individual of his property. The amendment is to be liberally construed, it is not to be confined to a legislative act specifically appropriating the property of A or B to some public use. A State acts by agents and the inhibition runs against all who are in fact such agents, acting within the scope of an authority conferred upon them by the State. In Chicago Burlington & Quincy R. R. *v.* Chicago, 166 U. S. 226, it is said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts
136 in the name and for the State, and *is clothed with the State's power*, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

A final judgment of a State court construing a State statute so as

to make it, although apparently innocuous, actually an interference with property rights has been held to be the act of a State. So too a State law, as it leaves the legislative hands, may not be obnoxious to any challenge and yet the officers charged with the administration of that valid law may so act under it as to work an illegal trespass upon the rights of individuals. Regan *v.* Trust Co. 154 U. S. 390. But in all such cases, and many have been cited in argument, the officers have acted under authority actually conferred upon them by the statute, there has been some measure of discretion confided to them and they have abused such discretion.

Now, in the case at bar, the first question to be considered is whether the State, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel which is the thing complained of. If the legislature had merely selected the streets and avenues and left it to the commissioners to determine whereabouts therein the tunnel should be located the action of the commissioners would be the action of the State. But it did no such thing; it carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be "due process of law," all to be carried on to a conclusion which should determine upon a route and general
137 plan *a* sufficiently detailed to show the "extent to which any avenue is to be encroached upon and the property abutting thereon affected." Upon such route only, and under such plan only is any authority to construct conferred by the State on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the State has not only not authorized them to commit but under any fair interpretation of the rapid transit act has forbidden them to commit.

If this court were persuaded to assent to the contention of defendants that this easterly tunnel is within the description in the approved route and general plan, as a mere "connection" or "siding" or what not, then it would take jurisdiction, because the action of commissioners, engineer, and contractors being in conformity to the general plan, which the legislature had provided for and sanctioned, would be action by persons acting under State authority, and thus constituted agents of the State to contravene the provisions of the constitutional amendment. But a different conclusion has been reached.

It seems unnecessary to discuss this branch of the case at length, for the reason that the precise point has been considered in a decision handed down this week in a similar cause pending in the State court. This court entirely concurs in the reasoning and in the conclusion, most tersely and forcibly expressed in the following excerpt from the opinion in Barney *v.* Rapid Transit Commissioners:

"These necessary details the 'routes and general plan' under-
. . took to show for the advisement of all persons interested,
138 and in order that intelligent action might be taken by them to conserve their best interests in the subsequent proceedings for the confirmation and approval of the plan.

Taking the words used in the 'routes and general plan' with the plans or drawings to which they referred, no person could be expected to apprehend that the fixed position of the tunnel, as under the central portion of the street, was subject to such a change as would bring it for about ten blocks to a point thirty feet nearer the building or house line than was indicated, merely because 'suitable connections' were to be made near Forty-second street.

A civil engineer might have found that something was omitted or that there was a variance between the plan, which showed the means of making connections, and the specifications which mentioned the proposed connections, but a layman, for whose advisement the 'routes and general plan' had been prepared under the statute, could properly assume that, in some way best known to engineering science, these 'suitable connections' were to be made from a tunnel under the middle of the street. Certainly he could rely upon the general proposition that the scientific construction of a railway, with the necessary curves for the approach toward a given point, does not depend upon guesswork or chance, and I think, therefore, that no reasonable interpretation of the 'routes and general plan' would afford room for justifying the extraordinary change in the position of the tunnel, as constructed, from the line described in the
139 lawfully approved plan of construction as to this particular locality. * * *

"The work of building the tunnel at the point in question is prosecuted without legal authority."

The complainant therefore, has failed to persuade this court that there is reasonable probability that she will be able upon the trial to show that the State of New York by any of its instrumentalities or agents has deprived, or is threatening to deprive her of her easements as an abutting property owner; and for that reason, without examining into the extent of such easements, her application for preliminary injunction is denied.

The stay in this case is vacated—and the filing of this opinion shall be sufficient evidence of such vacation.

August 27th, 1902.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—Huntington *vs.* City of Nw York.—Opinion, Lacombe, J.—U. S. circuit court, southern district of New York, Filed Aug. 28, 1902, John A. Shields, clerk.

140 Supreme Court of the United States.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK and Others, Defendants. } No. 506, October Term, 1902.

It is hereby stipulated and agreed, by and between the parties hereto, that the clerk of the circuit court of the United States for the

southern district of New York certify and forward to the clerk of this court to be filed herein, copies of the affidavits of Alexander E. Orr, William Barclay Parsons, both verified on the 6th day of August, 1902, of William Barclay Parsons, verified the 11th day of August, 1902, and of William Barclay Parsons, verified the 19th day of August, 1902, all of which affidavits were originally made in the suit brought in the circuit court of the United States for the southern district of New York, wherein Arabella D. Huntington is complainant and the defendants herein are defendants, and were filed in the office of the clerk of that court on the 29th day of August, 1902, which said affidavits, by consent, were read by the defendants in opposition to the complainant's motion for an injunction herein; and of the opinion of the Hon. E. Henry Lacombe, United States circuit judge, filed in said suit, to which opinion reference is made in the memorandum of opinion filed herein, and that the said copies be added to and be deemed to be a part of the record filed
141 herein on the 13th day of November, 1902, with the same force and effect as though they had been originally included therein.

Dated New York, November 28th, 1902.

ARTHUR H. MASTEN,
Solicitor for Complainant.

G. L. RIVES,
Solicitor for the Defendant The City of New York and Others.

EDWARD M. SHEPARD,
Solicitor for Alex. E. Orr and Others, Comm'rs of Rapid Transit.

DE LANCEY NICOLL,
Solicitor for the Defendant John B. McDonald.

HOWLAND, MURRAY & PRENTICE,
Solicitors for Def't May L. Shaler.

(Endorsed:) Supreme Court of the United States.—Charles T. Barney against The City of New York and others.—Stipulation.—Edward M. Shepard, solicitor for the defendant, Board of Rapid Transit Railroad Commissioners and others, 26 Liberty street, borough of Manhattan, city of New York.

142 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to fifty-one inclusive, contain a true and complete transcript of the affidavits, opinion and stipulation recited in said stipulation in the cause entitled Charles T. Barney appellant, against The City of New

York, *et al.* appellees as the same remain of record and on file in my office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2d day of December, in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

143 [Endorsed:] United States circuit court of appeals for the second circuit. Charles T. Barney appellant *vs.* The City of New York *et al.*, appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

144 [Endorsed:] File No. 18,734. Supreme Court of the United States, October term, 1902. Term No. 159. Charles T. Barney, appellant, *vs.* The City of New York *et al.* Stipulation & addition to record. Filed December 5, 1902.

145 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house in the Post office building in the county of New York on the 10th day of October, 1902.

Present: Honorable E. Henry Lacombe, circuit judge.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald and May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

The complainant having moved for an injunction *pendente lite*, restraining and enjoining the said City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira L. Shaler, deceased, defendants herein, and each of them, their agents and servants and all persons claiming under or through them, from excavating or blasting

146 or doing any act toward the construction or completion of a rapid transit railway in the borough of Manhattan, city of New York, under or upon Park avenue, in the easterly half thereof, in front of complainant's premises at the northeast corner of Park avenue and 38th street in the city of New York; and thereafter, the

motion upon the return of said order to show cause having, on the 10th day of October, 1902, been brought on for hearing, Mr. Arthur H. Masten appearing for complainant, and Mr. Edward M. Shepard appearing for the defendants, and due deliberation having been thereupon had,

Now, on reading and filing the said order to show cause, dated the 23rd day of August, 1902, and the papers upon which the same was granted, to wit: the bill of complaint verified the 23rd day of August, 1902, the affidavit of Anderson H. Tyson, verified the 23rd day of August, 1902, the affidavits of Forsyth Wickes, verified the 23rd day of August, 1902, submitted by the complainant in support of the motion, and on reading and filing affidavits presented by the defendants, which affidavits were originally made in the suit brought in this court wherein Arabella D. Huntington is complainant and the defendants herein are defendants, and which by consent are read in this case with like effect as if originally made herein, the same being the affidavits of Alexander E. Orr, William Barclay Parsons, Terence Farley and Edward J. Prest, all verified the 6th day of August, 1902, the affidavit of William Barclay Parsons, verified the 11th day of August, 1902, and the affidavit of William Barclay
147 Parsons, verified the 19th day of August, 1902, and after hearing counsel for the respective parties, and the complainant upon settlement of this order withdrawing objection that the question of jurisdiction can be raised only by a plea,

Ordered that this suit and the bill of complaint therein be, and they hereby are, dismissed and stricken from the docket of this court, with costs, for the reason that such suit does not really substantially involve a dispute or controversy properly within the jurisdiction of this court.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. circuit court, southern district of New York.—Charles T. Barney, vs. The City of New York and others.—Order.—Edward M. Shepard, Boardman, Platt & Soley, solicitors for Board of Rapid Transit R. R. Commissioners, 26 Liberty street, New York city. U. S. circuit court, southern district of New York, Filed Oct. 15, 1902, John A. Shields, clerk.

148 Supreme Court of the United States.

CHARLES T. BARNEY, Complainant, *against* THE CITY OF NEW YORK and Others, Defendants.	No. 506, October Term, 1902.

It is hereby stipulated and agreed by and between the parties hereto that the clerk of the circuit court of the United States for the southern district of New York certify and forward to the clerk of this court, to be filed herein, a copy of the decree entered herein on

October 15th, 1902, and that said copy be added to, and be deemed to be a part of, the record filed herein on the 13th day of November 1902, to the same force and effect as though it had been originally included therein.

Dated New York, July 16th, 1903.

ARTHUR H. MASTEN,
Solicitor for Complainant.
EDWARD M. SHEPARD,
Solicitor for Alexander E. Orr and Others, Commissioners of Rapid Transit.
HOWLAND, MURRAY & PRENTICE,
Solicitors for Defendant May L. Shaler, as Administratrix, etc.
NICOLL, ANABLE & LINDSAY,
Att'ys for Def't John B. McDonald.
GEORGE L. RIVES,
Solicitor for Def'ts The City of New York, & al.

149 [Endorsed:] Supreme Court of the United States. Charles T. Barney, complainant, against The City of New York and others defendants. Stipulation. Arthur H. Masten, solicitor for complainant, 49 Wall street, New York.

150 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to five inclusive, contain a true and complete transcript of the decree and stipulation of counsel, in the cause entitled Charles T. Barney, complainant, appellant, against The City of New York, and others, defendants, appellees, as the same remain of record and on file in my office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of July in the year of our Lord, one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-eighth.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States circuit court of appeals for the second circuit. Charles A. Barney appellant *vs.* The City of New York and others appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

151 [Endorsed:] File No. 18734. Supreme Court U. S. October term, 1903. Term No. 159. Chas. T. Barney, appellant, *vs.* The City of New York *et al.* Stipulation of counsel & addition to record. Filed July 21", 1903.

Endorsed on cover: File No. 18734. S. New York, C. C. U. S. Term No. 159. Charles T. Barney, appellant, *vs.* The City of New York, The Board of Rapid Transit Railroad Commissioners for the City of New York, *et al.* Filed November 13, 1902.

FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. ~~306~~ 159.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit, JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,
Appellees.

Now comes Charles T. Barney, the appellant in the above-entitled cause, by Arthur H. Masten and Maxwell Evarts, his counsel, and moves the Court to advance the above-entitled cause in accordance with Rule 32 of the Rules of the

Supreme Court of the United States, upon the ground that the only question at issue therein is the question of the jurisdiction of the Court below, viz.: the Circuit Court of the United States for the Southern District of New York.

The appellant further moves this Court, for the reasons stated in the memorandum filed herewith, for leave to orally argue said cause.

If the Court should for any reason deem it undesirable to grant the motion to orally present this cause, then the appellant asks that the cause should not be advanced.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
Of Counsel for the Appellant.

FILE COPY.

Office Supreme Court U.S.
FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 906. 159

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit; JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,
Appellees.

MEMORANDUM IN SUPPORT OF MOTION TO ADVANCE CAUSE FOR ORAL ARGUMENT.

By the Rapid Transit Act, passed by the Legislature of the State of New York in 1891 (Chap. 4 of the Laws of New York of 1891), the

appellees, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, William S. Smith and John Claflin, were designated and appointed Commissioners of Rapid Transit and were given power and authority, and the duty was imposed upon them by said act, to determine and establish the route and general plan of a subway in the city of New York and to build and construct the same.

By section 18 of Article 3 of the Constitution of the State of New York, it is provided as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall de-

termine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In pursuance of the powers conferred upon them by the Rapid Transit Act the Commissioners aforesaid determined upon a plan of construction of a subway in the City of New York to which the appellant gave his written consent. The Commissioners of Rapid Transit were however unable to obtain the consent of the owners of one-half in value of the property on Park Avenue as required by the provision of the Constitution of the State of New York above referred to, and as also required by the provisions of the Rapid Transit Act, and in lieu thereof under the provisions of said act they submitted a plan of construction to the authorities of the City of New York and to the Appellate Division of the Supreme Court of the State of New York for the First Department, by which it was provided that the portion of the subway through Park Avenue between 34th and 42d Streets, should be built in such a manner that the exterior surface

of the easterly wall of said tunnel should be 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue. This plan of construction was approved by the Court and the city authorities and was the plan to which the appellant had given his written consent.

In March, 1902, the foundations of many of the houses on the east side of Park Avenue, between 37th and 38th Street gave way and the houses began to slide into the subway, and it was then learned for the first time that the tunnel as being constructed was unauthorized and was not being built in accordance with the general plan of construction approved by the Appellate Division as aforesaid, and consented to by the appellant, and that the easterly wall of said tunnel instead of being 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue was within 7 feet thereof.

The appellant is the owner of the house No. 101 East 38th Street, being on the northeast corner of Park Avenue and 38th Street. Upon ascertaining the cause of the destruction of the houses on the adjoining block the appellant brought this suit in the Circuit Court of the

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United States for the Southern District of New York, and applied for an injunction to prevent a further construction of the subway in the unauthorized route, to compel a filling in of the tunnel as improperly constructed and to recover the damages sustained by him. The jurisdiction of the Court below was claimed by the appellant upon the ground that the defendants had been specifically named in the Rapid Transit Act and had been thereby clothed by the Legislature of the State of New York with the power and duty of constructing the subway and that therefore whatever they did to carry out and perform the duty imposed upon them by the State was the act of the State and that his house and the easements in his property adjoining the tunnel were being taken from him by them without just compensation, and therefore in violation of the Fourteenth Amendment of the Constitution of the United States which provides that a State cannot deprive a person of his property without due process of law.

The Court below found the tunnel as constructed to be illegal and without authority of law, but denied the application for an injunction and dismissed the cause for want of jurisdiction

upon the ground that the unauthorized construction of the tunnel by the Rapid Transit Commissioners was not an act of the State of New York, but was the act of the appellees in their character of private individuals and as trespassers. In other words, the Court held that the acts of the Commissioners in building the tunnel in an authorized manner and in accordance with the plan approved by the Appellate Division were the acts of the State of New York, but that the moment they constructed the tunnel in an unauthorized and improper manner, that then they ceased to be clothed with the power and authority of the State, assumed their characters as individuals and became trespassers. In the opinion of the Court, reported in 118 Fed. Rep., 683, it was said as follows at pp. 686, 687:

> " Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein

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the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. *When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit.*"

The question presented is a novel one of importance never directly determined by this Court. Is a person whose property is being taken from him in violation of the provisions of the Constitution of the United States by persons clothed with the power of a State by an act of the Legislature precluded from seeking the jurisdiction of

a Federal Court upon the theory that such appointees of the State acted as individuals when they undertook to perform in an unauthorized manner the duty imposed upon them by the State?

In the case of Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, it was said at page 233:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

In the case of Railroad and Telephone Companies vs. Board, 85 Fed. Rep., 302, 317, it was said as follows:

"We have here a serious contention that a constitutional guaranty has been denied to these plaintiffs, and, if such is the case, it would seem to be equally a deprivation of a right secured by the fourteenth amendment to the federal constitution. County of San Mateo v. Southern Pac. R. Co., 13 Fed., 722; County of Santa Clara v. Southern Pac. R. Co., 18 Fed., 385; Fraser v. McConway & T. Co., 82 Fed., 257; Indianapolis Gas Co. v. City of Indianapolis, *id.*, 245; Railroad Co. v. Ellis, 165 U. S., 150; 17 Sup. Ct., 255. Nor does it change the effect to say that the statute itself is valid, and that the error was one merely in the administration of the law. The injury is just the same. In Regan v. Trust Co., 154 U. S., 390; 14 Sup. Ct., 1051, the supreme court of the United States said in respect to this point:

"'Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers

> charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts.' "

To the same effect see,

Scott vs. McNeal, 154 U. S., 34, 45.
Wright vs. Nagle, 101 U. S., 791, 794.
Ex parte Virginia, 100 U. S., 339, 346.

While this question is one of jurisdiction of the Court below, yet at the same time it is a broad constitutional question of far-reaching importance and in no way confined to the particular case at bar. The general doctrine laid down by the Court below is, that when the Governor of a State or any other officer or person is appointed by an act of the Legislature to do a particular thing, and does that particular thing in an unauthorized and improper manner, then the act of such appointee is not the act of the State, but of the individual, and that therefore, no Federal

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Court can take jurisdiction of a suit brought by a person deprived of his property without due process of law, by the improper conduct of an officer or person clothed with powers conferred upon him by a State.

We ask leave of this Court to present this question orally, believing that it is one of such importance that it would be difficult, if not impossible, to fully present it upon printed briefs alone, and we urge an early advancement of this cause (if oral argument is also granted) for the reason that since this cause was originally brought, the apprehensions of the appellant have been fulfilled, and within the last few weeks, the foundations of his house have begun to give way and the building has been condemned as unsafe by the Department of Buildings of the City of New York.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
Of Counsel for the Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 159.

CHARLES T. BARNEY,

Appellant,

against

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit; JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,

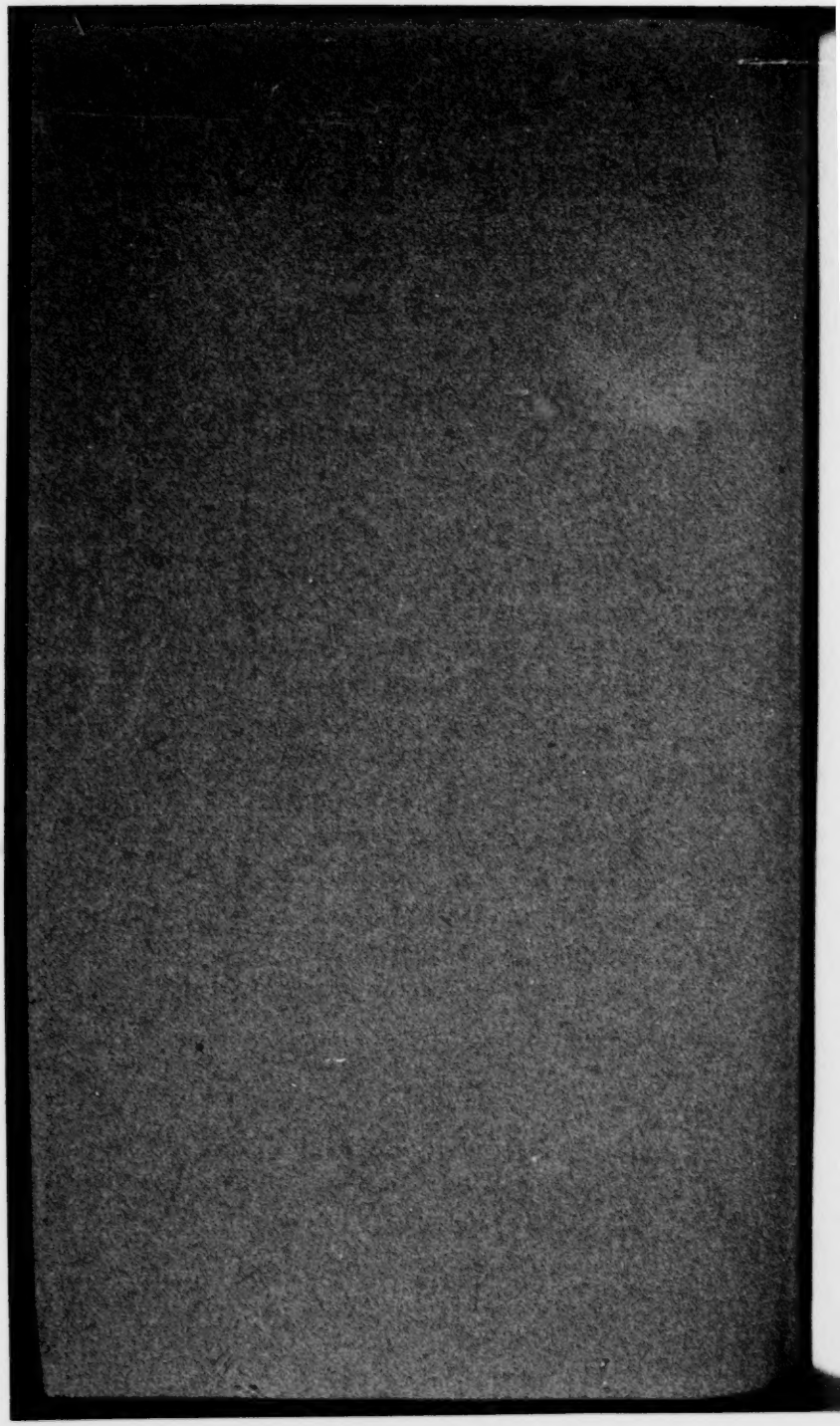
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
Of Counsel for Appellant.

C. H. Simonds, Walker and Gordon Street, N. Y.



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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No 159.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit; JOHN B. MCDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

Statement.

By the first section of the Rapid Transit Act passed by the Legislature of the State of New York in 1891 (Chap. 4 of the Laws of New York of 1891) the appellees, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, were designated and appointed Commissioners of Rapid Transit and were given power and authority, and the duty was imposed upon them by said act to determine and establish the route and general plan of a subway in the City of New York, and to build and construct the same. The provisions of this section are as follows:

> "SEC. 1. In each city having over one million of inhabitants, according to the last preceding national or state census, there shall be a board of rapid transit railroad commissioners in and for such city, which shall consist of the mayor of such city, the comptroller or other chief financial officer of such city, the president of the chamber of commerce of the state of New York, by virtue of his office, and the following named persons, to wit: William Steinway, Seth

> Low, John Claflin, Alexander E. Orr and John H. Starin. The members of said board shall be styled commissioners of rapid transit. * * * * The board thus constituted shall have and exercise the specific authority and powers hereinafter conferred and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by this act."

It is to be noted that the Board of Rapid Transit by the last sentence of the section above quoted is given broad discretionary powers to do whatever may be requisite to the efficient performance of the duties imposed upon it by the act.

Section 4 of the Transit Act authorizes the Board to determine the route and general plan of construction of any rapid transit railway that it may deem necessary for the interests of the public, and requires that,

> " such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected."

By section 18 of Article 3 of the Constitution of the State of New York, it is provided as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether, such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In accordance with these constitutional requirements the Rapid Transit Act (Section 5) further provides that after any determination by the said Board of any route or routes and of any general

plan of construction of said railway, the said Board shall obtain the consent of the city and of the local authorities having exclusive control of any street which is to be used or occupied by said railroad.

"Upon obtaining the approval and consent of the local authorities, as above provided, the said Board of Rapid Transit Railroad Commissioners shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. * * *

"If such consents of property owners cannot be obtained, the said Board may in its own name, make application to the General Term of the Supreme Court in the Judicial District in which such railway is to be constructed, for the appointment of three Commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. * * * The said Commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated, and shall report the evidence taken to said General Term, together with

a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road, shall, when confirmed by said Court, be taken in lieu of the consent of the property owners above mentioned."

Section 6 further provides as follows:

"When the consents of the local authorities and the property owners, or, in lieu thereof, the authorization of the said General Term of the Supreme Court upon the report of Commissioners, shall have been obtained, the Board of Rapid Transit Railroad Commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railway or railways *in accordance with the general plan of construction*, including all devices and appurtenances deemed by it necessary to secure the greatest efficiency, public convenience and safety, including the number, location and description of stations and plans and specifications for suitable supports, turnouts, switches, sidings, *connections*, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices, and other suitable appliances

> incidental and requisite to what the said Board may approve as the best and most efficient system of rapid transit in view of the public needs and requirements. * * * The Board may, from time to time, alter such detailed plans and specifications, *but always so that the same shall accord with the general plan of construction.*"

In pursuance of the powers conferred upon them by the Rapid Transit Act the Commissioners aforesaid determined upon a plan of construction of a subway in the City of New York to which the appellant gave his written consent (Record, p. 27). The Commissioners of Rapid Transit were however unable to obtain the consent of the owners of one-half in value of the property on Park Avenue as required by the provision of the Constitution of the State of New York above referred to, and as also required by the provisions of the Rapid Transit Act, and in lieu thereof under the provisions of said act they submitted a plan of construction to the authorities of the City of New York and to the Appellate Division of the Supreme Court of the State of New York for the First Department, by which it was provided that the portion of the subway through Park

Avenue between 34th and 42d Streets, should be built in such a manner that the exterior surface of the easterly wall of said tunnel should be 37 feet and six inches from the building line of the houses on the east side of Park Avenue (Record, pp. 6, 24). This plan of construction was approved by the Court and the city authorities, and vas the plan to which the appellant had given his written consent (Record, pp. 8, 9, 27).

In March, 1902, the foundations of many of the houses on the east side of Park Avenue, between 37th and 38th Streets, gave way and the houses began to slide into the subway. It was then learned for the first time that the tunnel as being constructed was unauthorized and was not being built in accordance with the general plan of construction approved by the Appellate Division as aforesaid, and consented to by the appellant, and that the easterly wall of said tunnel instead of being 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue was within 7 feet thereof (Record, pp. 9, 25).

The appellant is the owner of the house No. 101 East 38th Street, being on the northeast corner of Park Avenue and 38th Street (Record,

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pp. 4, 27). Upon ascertaining the cause of the destruction of the houses on the adjoining block the appellant brought this suit in the Circuit Court of the United States for the Southern District of New York, and applied for an injunction to prevent a further construction of the subway in the unauthorized route, to compel a filling in of the tunnel as improperly constructed and to recover the damages sustained by him (Record, p. 39). The jurisdiction of the Court below was claimed by the appellant upon the ground that the defendants composing the Board of Rapid Transit had been specifically appointed by and named in the Rapid Transit Act and had been thereby clothed by the Legislature of the State of New York with the power and duty of constructing the subway; that, therefore, whatever they did to carry out and perform the duty imposed upon them by the State was the act of the State and that his house and the easements in his property adjoining the tunnel were being taken from him by reason of the illegal construction of the tunnel by them without just compensation, and therefore in violation of the Fourteenth Amendment of the Constitution of the United States, which provides that a State cannot deprive a person of his property without due process of law.

The Court below found the tunnel as constructed to be illegal and without authority of law, but denied the application for an injunction and dismissed the cause for want of jurisdiction upon the ground that the unauthorized construction of the tunnel by the Rapid Transit Commissioners was not an act of the State of New York, but was the act of the appellees in their character of private individuals and as trespassers. In other words, the Court held that the acts of the Commissioners in building the tunnel in an authorized manner and in accordance with the plan approved by the Appellate Division were the acts of the State of New York, but that the moment they constructed the tunnel in an unauthorized and improper manner, they then ceased to be clothed with the power and authority of the State, assumed their characters as individuals and became trespassers. In the opinion of the Court (Record, p. 67), it was said as follows, at p. 71:

> "Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel

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which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. *When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit.*

"If this Court were persuaded to assent to the contention of defendants that this easterly tunnel is within the description in the approved route and general plan, as a mere 'connection' or 'siding' or what not,

then it would take jurisdiction, because the action of commissioners, engineer, and contractors being in conformity to the general plan, which the legislature had provided for and sanctioned, would be actions by persons acting under State authority, and thus constituted agents of the State to contravene the provisions of the constitutional amendment."

From the final decree dismissing the bill upon the ground that the suit did not involve a dispute or controversy properly within the jurisdiction of the Court (Record, p. 74), this appeal has been taken under the provisions of Section 5 of the Circuit Court of Appeals Act (26 U. S. Stat., 826) upon the question of jurisdiction alone, which has been certified to this Court as follows (Record, p. 42):

"Is this court without jurisdiction of this cause for the reason that the acts of the defendants in building and constructing the easterly portion of the tunnel in Park Avenue in the City of New York were not acts of the State of New York to which the prohibition of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall 'deprive any person of life, liberty or property without due process of law,' has application?"

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FIRST POINT.

The Court below had jurisdiction of the cause.

The single question presented upon this appeal is whether the act of the Board of Rapid Transit in building the subway in Park Avenue between 34th and 42d Streets in an unauthorized and illegal manner was the act of the State of New York.

If so, then the Court below should have retained jurisdiction of the cause. If not, then the decision of the lower Court was right.

By the Fourteenth Amendment to the Constitution of the United States, it is provided as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

The prohibition of this amendment refers to action by a State, which obviously can act only through its officers or agents. It was conceded by the Court below that the Board of Rapid Transit having been appointed by an act of the Legislature was an agent of the State of New York and that if the plaintiff had been deprived of his property without due process of law by any

act of the Board of Rapid Transit done in pursuance of power specifically given it by the Rapid Transit Act, it should have retained jurisdiction of the cause. The only difficulty presenting itself to the Circuit Court and preventing it from taking jurisdiction of the case was that the act of the Board in building the tunnel as it did was so illegal and so unauthorized that in its opinion it must be deemed to be a trespass on the part of the individual members of the Board and not an act done by said Board in its capacity of agent of the State of New York and in pursuance of the power given it by the Rapid Transit Act.

The theory of the Court seemed to be that an agent of the State can only be considered such when it acts in conformity with the specific authority given to it by the Act of the Legislature creating it, and that if it does any act without express legislative authority, although purporting to act by reason of the power and right conferred upon it by the State, such act is not done in its character as agent and is not to be deemed the act of the State.

The question is important, and as an abstract proposition it would seem difficult to support the

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contention that a person appointed to do a particular thing by an act of the Legislature of the State, who does that particular thing because of the authority derived from the legislature, but not in the specific manner directed thereby, is therefore to be deemed to be acting in his individual capacity and as a trespasser. It is certainly difficult to forecast the result of such a doctrine, if a State can repudiate the action of its Governor or Treasurer, whenever it deems such action to have exceeded the authority given or intended to be given them.

We believe, however, that this question is no longer open for argument and that it has been decided by this Court that any act of an agent of a State, done pursuant to the powers derived by him from the Legislature and by virtue of his public position as such agent, whether specifically authorized by the statute appointing him or not, is an act of the State within the meaning of the Fourteenth Amendment of the Constitution.

In the case of *ex parte* Virginia, 100 U. S., 339, it appeared that a Judge of a County Court in Virginia, charged by the law of that State with the selection of jurors, excluded from the Jury list, made out by him as such officer, grand

jurors and petit jurors of African race and black color, on account of their race and color. He was indicted by the Federal Grand Jury for a violation of the act of Congress entitled "An Act to Protect all Citizens in their Civil and Legal Rights," which provided "that no citizen * * * shall be disqualified from service as grand or petit juror in any Court * * * of any State on account of race, color or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall on conviction thereof be guilty of a misdemeanor." An application was made by the indicted Judge of the State Court to this Court for a writ of *habeas corpus*. The petition for the writ was denied, and this Court held that the federal statute referred to was authorized by the Fourteenth Amendment of the Constitution and that the act of the Judge was in effect the act of the State of Virginia denying to a "person within its jurisdiction the equal protection of the laws." At page 346 of the opinion it was said by Mr. Justice STRONG, as follows:

"We have said the prohibitions of the

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Fourteenth Amendment are addressed to the States. They are, 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any within its jurisdiction the equal protection of the law.' They have reference to the actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position under a State goverment, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State.* This must be so, or the constitutional prohibition has no meaning."

In the Virginia case the question was raised that the act of the Judge was not authorized by

the State Statute. As to this the Court said at page 348:

> "But if the selection of jurors should be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted *outside of his authority and in direct violation of the spirit of the State Statute?* That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion."

Assuming that the Board of Rapid Transit in the present case was given no authority by the Rapid Transit Act to construct the tunnel as it has done, it is not plain what distinction can be drawn between the Virginia case and the case at bar. In the former the Judge was not authorized by the State statute to exclude from the jury list jurors on account of their race and color. He however did so acting under the power given him by the State to select the jury lists and his act in so doing was held an act of the State. If, in the present case, the Board had no authority to build the tunnel as it did, yet it did so build it

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by virtue of its public position and under the general power given to it by the Legislature to build a tunnel in Park Avenue, in the City of New York, and it would seem to follow from the Virginia case that the Board in so constructing the tunnel acted as the agent of the State.

The case of Neal vs. Delaware, 103 U. S., 370, came before this Court upon a writ of error to the State Court of Delaware. The plaintiff in error having been indicted for rape under the laws of Delaware, of which he was a citizen, petitioned the State Court for a removal of the case to the Circuit Court of the United States, alleging that all colored persons were systematically excluded from serving as grand or petit jurors in the State Courts by reason of the action of the officers charged with making up the jury lists, and that petitioner was thus denied the equal civil rights guaranteed by the Fourteenth Amendment. The petition having been denied and the plaintiff compelled to go to trial, he therefore moved, upon the same grounds, to quash the indictment. The motion was denied and the plaintiff, having been convicted, sued out the writ of error.

This Court having first ruled that no such exclusion of the colored race was justified by

either the Constitution or the laws of the State, held that the case was not one embraced by the removal statute as construed in Virginia vs. Rives, *supra*. The majority opinion then proceeds as follows (pp. 394–397):

> "Although for the reasons we have given the prisoner was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting jurors were guilty of the offense charged in his petition. A denial upon their part, of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia v. Rives*, *supra* 'the court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review. * * * It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judg-

ment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by Mr. Justice STRONG, in *Ex-parte Virginia*, we said, and now repeat, that 'a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, * * * violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.'"

The judgment of the State Court was accord-

ingly set aside and the case remanded for further proceedings. Throughout the argument no stress is laid on the fact that discretion was vested in the State officials. Undoubtedly they were entitled to the exercise of a large discretion in the choice of individuals to be placed upon the jury lists, but this discretion did not extend to discrimination on account of race or color, and when they overstepped these limits, they became willful violators of the statute. Nevertheless, such action was deemed action by the State within the meaning of the Fourteenth Amendment.

The doctrine of *ex parte* Virginia, was substantially reaffirmed in the Civil Rights Cases, 109 U. S., 3, and it was there said of this case by Mr. Justice BRADLEY, as follows at p. 15:

> "In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. *Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule;* and it is against such State action, through its officers and agents, that the last clause of the section is directed."

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It was attempted in the Civil Rights Cases to extend the application of the Fourteenth Amendment to cases where a person had been denied equal protection of the laws and had been deprived of his life, liberty or property by an individual unsupported in any way by State authority. That is to say, in the Civil Rights case it was claimed that the act of an innkeeper in refusing accomodations to colored men was the act of the State, prohibited by the Fourteenth Amendment of the Constitution of the United States. This Court declined to hold that an innkeeper refusing accommodation to a colored man was an agent of the State, and said at page 17 as follows:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property,

or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. * * * Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, *the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.*"

In the case of Yik Wo vs. Hopkins, 118 U. S., 356, it was held that a municipal corporation was the agent of the State and that any *administration* of a municipal ordinance which made an arbitrary and unjust discrimination founded on

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differences of race was a violation of the Fourteenth Amendment of the Constitution in that it denied the equal protection of the laws to the Chinese race.

At page 374, the Court said:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and

impartial in appearance, yet, if it is applied and administered by *public authority* with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * * *

"The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

In the case of Scott vs. McNeal, 154 U. S., 34, it was held that a decision of the highest Court of the State of Washington by which the purchaser at an administrator's sale under order of the Probate Court of land of a living person who had no notice of the proceeding, was the act of the State of Washington within the meaning of the Fourteenth Amendment of the Constitution of the United States, and deprived him of his property without due process of law, contrary to such amendment.

In Missouri Pacific Railway vs. Nebraska, 164

U. S., 403, it was held that the State Board of Transportation created by an act of the Legislature of Nebraska, was the agent of the State, and that the act of such Board requiring a railroad, which had permitted the erection of an elevator by a private person on its right of way, to grant the same right to other private persons upon like terms is to be deemed the act of the State of Nebraska and the taking of private property of the railroad for a private use in violation of the Fourteenth Amendment of the Constitution of the United States.

In Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, this doctrine was again approved in a case in which the question was whether the State Court had by its decision in a condemnation proceeding deprived a citizen of his property without due process of law. It was held that the decision of the Court was the act of the State of Illinois, and it was said at page 233, as follows:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore, whoever, *by virtue of public*

> *position* under a State Government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.' "

Although guilty of a deviation of some thirty feet from the duly filed routes and general plan hereinbefore referred to, the Board of Rapid Transit has acted in the name of and for the State, and from purely public motives. It has been clothed with the State's power, and its acts, even though now held by the Court below to have been unauthorized, were in point of fact carried through solely by virtue of the authority conferred upon it by the State and because of the power derived from the Legislature.

In Reagan vs. Farmers' Loan and Trust Company, 154 U. S., 362, it appeared that the Legislature of the State of Texas passed an act to establish a railroad commission, giving the said commission the power and imposing upon

it the duty of establishing reasonable rates. What rates should be deemed reasonable was left to the discretion of the commission. The commission duly organized and proceeded to establish certain rates, whereupon the Farmers' Loan and Trust Company filed its bill in the Circuit Court of the United States for the Western District of Texas, averring that such rates were unreasonable and unjust and praying a decree restaining the commission from enforcing the same. Upon the appeal to this Court, two points were decided: *First*, that this suit could not be deemed a suit against a State within the meaning of the Eleventh Amendment to the Constitution. *Second*, that the rates as established by the commission were unreasonable and therefore within the prohibition of the Fourteenth Amendment against State action resulting in unjust discrimination and unequal protection of the laws. The enforcement of the particular rates in question was restrained, and at page 390 the Court expressed itself in the following terms:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. *A valid law may be wrongfully administered by officers of*

> *the State, and so as to make such administration an illegal burden and exaction upon the individual.* A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

What constitutes the act of a State with reference to the provisions of the Fourteenth Amendment to the Federal Constitution was fully discussed by Mr. Justice McKenna, while Circuit Judge, and by Judge Taft, when a member of the Circuit Court of Appeals.

In *Iron Mountain R. Co. vs. City of Memphis*, 96 Fed. Rep., 113, before the Circuit Court of Appeals for the Sixth Circuit, TAFT J., in delivering the opinion of the Court, after pointing out that the constitutional prohibition must refer to any agency of the State, continued as follows (p. 121):

"The first question presented is whether action by the legislative council of the City of Memphis under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this ammendment. There can be little doubt upon this point. * * *

"The principle was applied in *Ex parte* Virginia to the judge of a county court who had excluded jurors from a jury in a state court on account of race, color, and previous condition of servitude. It was followed and restated in Neal vs. Delaware, 103 U. S., 370–397, where the particular act under investigation was the act of the officers charged by the law with the selection of jurors. This was held to be State action, and in so far as the officers excluded from the jury men on account of their race it was held to be a violation of the Fourteenth Amendment."

The case of Pacific Gas Imp. Co. vs. Ellert, 64 Fed. Rep., 421, came before Mr. Justice McKENNA, then Circuit Judge, upon an order to show cause why an injunction should not be continued. The bill of complaint alleged that the Board of Supervisors of San Francisco, assuming to act under

an act of the Legislature approved March 18, 1885, known as the "Street Law" (Chapter 153 of Laws of 1885, as amended) had posted a resolution of intention to improve a pretended street designated as "Lewis Street," thereby threatening to destroy the property of the plaintiff. The bill further alleged that no kind of legal proceedings had ever been instituted for opening such a street or for condemning or acquiring any of the property rights of the plaintiff. The Street Law only authorized the Board to improve or repair streets already opened and in existence, but conferred no power to condemn or take property not already acquired. (See p. 429 of the opinion and California cases there cited; also the text of the statute). The case presented is therefore on all fours with the one under discussion. The learned Justice, after stating the facts, addressed himself to the question of jurisdiction as follows:

> "The questions involved are the right of the plaintiff as riparian proprietor; the character and legality of the acts of Board of Supervisors, as infringing that provision of the Fourteenth Amendment of the Constitution of the United States which prohibits a

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state from depriving a person of property without due process of law. * * * The defendants, however, urge that the fourteenth amendment is only directed against state action by the Legislature, *or if it is* prohibitive of executive acts, *only of authorized executive acts*, and that in the case at bar there is no act of the Legislature under which plaintiff's property is sought to be taken, and that if Lewis Street is not open or has not been dedicated, the Board of Supervisors is proceeding without authority, and its acts cannot be attributable to the state. Both contentions appear to be opposed to *Ex parte* Virginia, 100 U. S., 346" (pp. 429–30).

After quoting at length from the opinion of Judge STRONG, Judge MCKENNA then continued:

"In Virginia vs. Rives, 100 U. S., 313–338, the same learned Justice said (p. 318): 'The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals * * * It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities—and the prohibition of the

amendment extends to all action of the State denying equal protection of the laws, whether it be by action by one of these agencies or by another.' This language is made unmistakable by the dissenting opinion of Justices FIELD and CLIFFORD. There was a series of cases involving the rights of the colored race, all of which were based on the same reasoning by the Court and by those learned Justices. In Virginia vs. Rives and *ex parte* Virginia the action was by judicial officers unauthorized by a State statute. The instance under consideration was the omission to put colored citizens on the jury list. The State statute made no discrimination. Justices FIELD and CLIFFORD therefore contended, among other things—but unavailingly contended—that the action of the officers was not the action of the State. * * * This Court, therefore, has jurisdiction, and it will be necessary to consider the other issues" (pages 430–1).

It is clear that the Board of Rapid Transit in this case built the subway in Park Avenue and took whatever action it did in that regard by virtue of its public position and of the powers and rights derived from the Rapid Transit Act.

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It is equally clear that such Board appointed by the Act of the Legislature is an agent of the State of New York, within the meaning of the Fourteenth Amendment of the Constitution, just as certainly as was the Texas Railroad Commission an agent of the State of Texas (Reagan vs. Farmers' Loan and Trust Company, *supra*), and the Nebraska State Board of Transportation an agent of the State of Nebraska (Missouri Pacific Railway vs. Nebraska, 164 U. S., 403).

We, therefore, respectfully submit that under the case of *Ex parte* Virginia (*supra*) and the other decisions of this Court above referred to, any act done by said Board of Rapid Transit in its public capacity, is the act of the State within the meaning of the Fourteenth Amendment of the Constitution as construed by this Court, even though such act may not have been in exact accordance with the specific powers given it by the Legislature, and that the tunnel as built in Park Avenue by the Board of Rapid Transit must be deemed to have been so built by the State of New York.

SECOND POINT.

The judgment of the United States Circuit Court for the Southern District of New York should be reversed.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
Of Counsel for Appellant.

[44,200]

Office Supreme Court U. S.
FILED
JAN 23 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

NO. 159.

CHARLES T. BARNEY,

Appellant,

against

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK and others,

Appellees.

BRIEF FOR APPELLEE JOHN B. McDONALD.

DELANCEY NICOLL,
PRATT A. BROWN,
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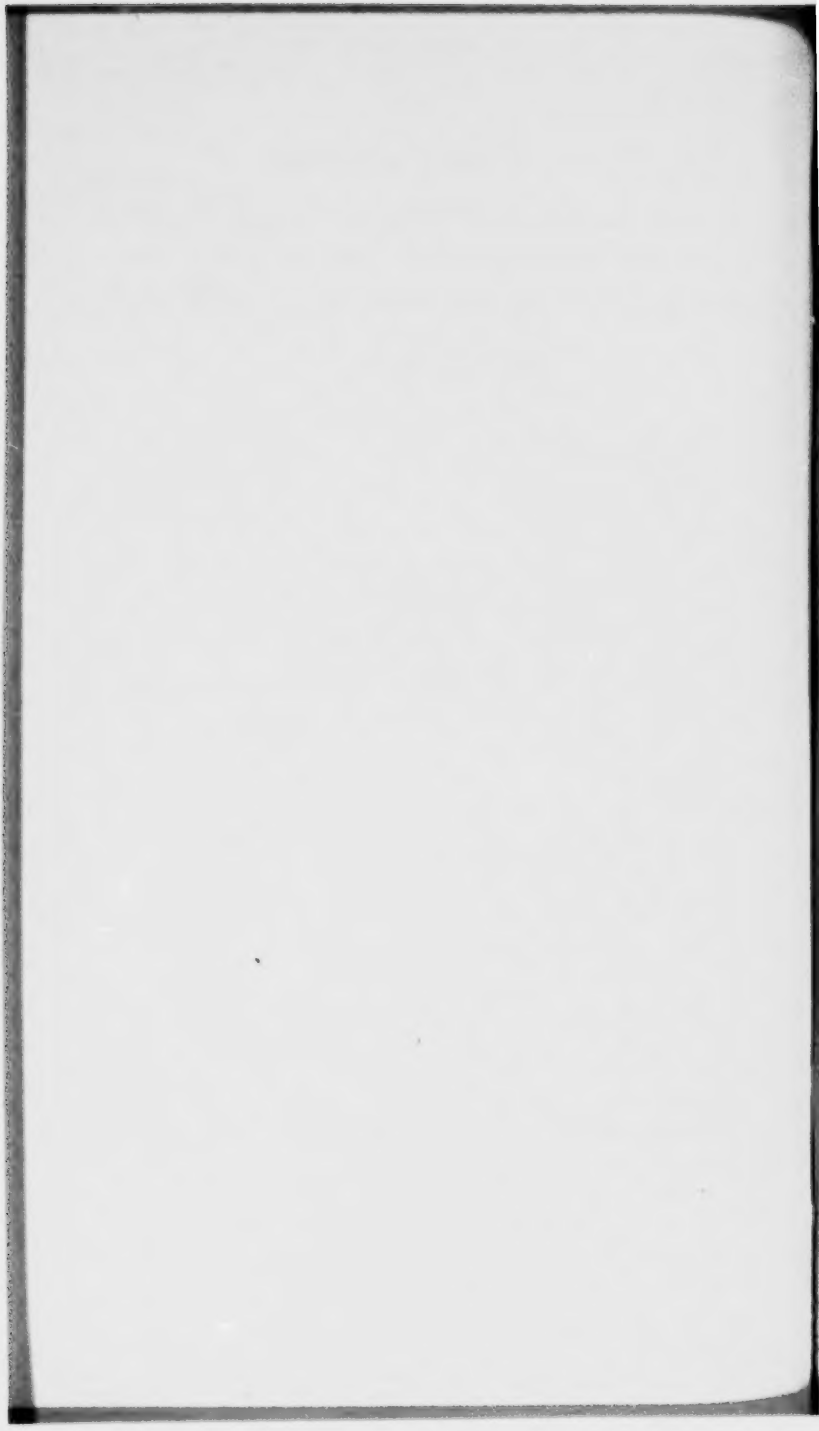

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Supreme Court of the United States.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESSUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit, JOHN B. MCDONALD, MAY L. SHALER as Administratrix of the estate of Ira A. Shaler, deceased,
Appellees.

BRIEF FOR APPELLEE JOHN B. McDONALD.

Statement.

The bill of complaint begins with a correct description of the parties to this suit, from which it appears that Charles T. Barney, the complainant, is a private person; that the defendant The City of New York is a municipal corporation; that the defendant The Board of Rapid Transit Railroad Commissioners is a board organized and existing under and by virtue of the laws of the State of New York; that the defendants Seth Low,

Edward M. Grout, Morris K. Jessup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin are Commissioners of Rapid Transit, composing the said board; that the defendants John B. McDonald and May L. Shaler, are private persons (Transcript, p. 3).

The Board of Rapid Transit Railroad Commissioners for the City of New York, composed of the persons above named, was created, organized and exists under and by virtue of Chapter 4 of the Laws of 1891, commonly known as the Rapid Transit Act (*Id.*, p. 3).

The said board has no power, except such as is derived from the said act (*Id.*, pp. 3–4). Subsequent to the organization of the said board and pursuant to the terms of the said act, the said board took various proceedings relative to the adoption of the routes and general plan of construction of a proposed rapid transit railroad in the City of New York (*Id.*, pp. 4–8). Thereafter the City of New York, acting through the said board, entered into a contract for the construction of the said railroad with the defendant John B. McDonald (*Id.*, p. 8). In the said contract it was provided that the said railroad should be constructed according to certain drawings, which the complainant alleges were deviations from certain original drawings annexed to, and forming part of, the routes and general plan previously adopted by the said board (*Id.*, pp. 8–9).

Subsequent to the making of the contract aforesaid the said defendant McDonald entered into a sub-contract with one Ira A. Shaler, whereby the said Shaler agreed to construct that portion of the said railroad running from a point 100 feet northwardly from the centre of Thirty-third street to the centre of Forty-first street in Park avenue, in accordance with the provisions of said contract (*Id.*, p. 9). Thereafter said Shaler entered upon the land in Park avenue, between the streets aforesaid, and commenced blasting, excavating, &c.

(*Id.*, p. 9). On the 29th of June, 1902, the said Shaler died, and thereafter and prior to the beginning of this suit the defendant, May L. Shaler, was duly appointed administratrix of the estate of the said Ira A. Shaler, and has since been and now is acting as such administratrix (*Id.*, p. 4). The complainant alleges that the work of construction as now in progress in Park avenue aforesaid is not in accordance with the said routes and plan, but that two tunnels are being constructed, the easterly one of which runs upwards of twenty-seven feet to the east of the place where the same was to have been constructed according to the contract drawings aforesaid, bringing the easterly wall of said easterly tunnel within about seven feet of the house line of the easterly side of said Park avenue (*Id.*, p. 9). The complainant is the owner of premises situated on the northeast corner of Park avenue and Thirty-eighth street (*Id.*, p. 4), directly adjacent to the work aforesaid.

It is alleged that the said work is being done without any authority other than certain directions given by the engineer employed by the Board of Rapid Transit Commissioners and that the fact of the deviation aforesaid was not until recently even known to the said Board (*Id.*, p. 10).

It is further alleged that if the work is to be thus *unlawfully* continued, and if the railroad shall be allowed to be operated along said *illegal* and *unauthorized* route, it will constitute a nuisance to complainant's property, and *will greatly interfere with his various easements in said avenue and deprive him of the enjoyment thereof; and his buildings will be irreparably injured by the excavations made in said avenue in front of his said premises and by the vibrations caused by the operation of said road; that the risk of injury to complainant's premises has become greater than it would have been if the road had been constructed according to said routes and general plan and that the risk of damage after the rail-*

road shall have been put in operation by reason of vibration "and other objectionable results" is greatly increased; that such acts will greatly and irreparably injure said premises and have interfered and will interfere with the use and quiet enjoyment of the same and his other easements appurtenant thereto; that no steps have been taken to acquire said easements and that said unlawful construction has constituted and will constitute an appropriation thereof, without due process of law, contrary to the provisions of the fourteenth amendment of the Constitution.

An injunction is thereupon prayed for, restraining the defendants from further constructing said railroad adjacent to complainant's premises "*until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.*"

Briefly the complainant's claim is this:

> He owns property abutting on Park avenue.
>
> The Board of Rapid Transit Railroad Commissioners had authority from the Legislature to lay out a route and build a railroad which should run through Park avenue.
>
> The Board laid out a route according to law and complainant consented to the construction of the railroad according thereto.
>
> The Board made a contract for the construction of the road along a route immaterially differing from that duly authorized.
>
> The Board had no authority from the Legislature to make any contract materially deviating from the duly adopted plan.
>
> The defendants McDonald and Shaler, without authority except from an employee of the Board, are constructing the road according to a materially different plan from that authorized by law.
>
> Such construction interferes with complain-

ant's easements in the street adjacent to his premises.

It is not alleged what easements are being interfered with.

The construction aforesaid increases the risk of damage to said premises from the excavation in the street and from vibration which may be caused by the operation of the road when completed.

The construction aforesaid is a nuisance.

The aforesaid interference with plaintiff's easements in the street is an appropriation thereof without due process of law, contrary to the provisions of the Constitution.

The complainant moved for a preliminary injunction and submitted papers amplifying the allegations of his bill. The motion was denied and, the complainant waiving the raising of the question of jurisdiction by plea, a final decree was made dismissing the bill for want of jurisdiction (see pp. 74–75).

The complainant appeals from such decree. The question of jurisdiction alone is certified, and that question alone can be considered upon this appeal.

McLish *v.* Roff, 141 U. S., 661.
Schunk *v.* Moline, M. & S. Co., 147 U. S., 500.

The rule by which the question of jurisdiction is to be determined is as follows:

> "It must appear on the record, by a statement in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."
>
> Defiance Water Co. *v.* City of Defiance, not yet reported—Decided Nov. 30, 1908.

Citing

Western Union Tel. Co. *v.* Ann Arbor Ry. Co., 178 U. S., 239.

Gold Washing & Water Co. *v.* Keyes, 96 U. S., 199.

Blackburn *v.* Portland Gold Mining Co., 175 U. S., 571.

Shreveport *v.* Cole, 129 U. S., 36.

New Orleans *v.* Benjamin, 153 U. S., 411, 424.

Pursuant to this rule it must be inquired:

1. Does the record disclose any action on the part of the *State*.
2. Does the record show any taking of any *property* of the complainant.

We believe the decree appealed from should be affirmed for the following reasons:

FIRST POINT.

The record does not show any action on the part of the State.

The provision of the Constitution which the complainant invokes is "nor shall any *State* deprive any person of life, liberty or property without due process of law." This provision is a prohibition against improper action by a *State* and not against willfully erroneous or improper acts of State officers or private individuals. This proposition is elementary and requires no discussion.

Guthrie's Lectures on the Fourteenth Amendment, p. 72.

United States *v.* Cruikshank, 92 U. S., 542, 554.

Civil Rights Cases, 109 U. S., 3.

United States *v.* Harris, 106 U. S., 629, 638.

Following out this principle, this Court has held flatly that when the Legislature of a State has enacted laws which, if followed, will furnish citizens the necessary constitutional protection of life, liberty and property, the State has performed its constitutional duty, and that the Federal courts are without jurisdiction to entertain suits based upon infractions of such laws until after the State, through its courts, has denied the rights which the Constitution guarantees.

This principle was apparently first laid down in

Arrowsmith *v.* Harmoning, 118 U. S., 194.

There the plaintiff sought, in the Court of Common Pleas of Defiance County, Ohio, to recover property of which he alleged he had been deprived without due process of law. The property which he claimed was sold under the direction of a special guardian appointed by the Probate Court for the purpose of making a sale. The special guardian made such sale without giving any bond, as required by the law of Ohio. In all other respects the sale was regular and the interests of the plaintiff fully protected. The Court of Common Pleas denied him relief, the judgment thereof was confirmed by the District Court, and subsequently by the Supreme Court of Ohio, and from the Supreme Court of Ohio the case was taken upon writ of error to this Court, where the judgment was affirmed, and where the principle above stated was laid down.

Citing and following the case last above cited, Putnam, *C. J.*, in the case of

In re Storti, 109 Fed. Rep., 807 (aff'd 183 U. S., 141),

denied a writ of *habeas corpus* in behalf of a subject of the King of Italy, who was in jail in Massachusetts as the result of a judgment and sentence of the State court of Massachusetts finding him guilty of murder and directing his electrocution. The

Court held that the Fourteenth Amendment had no application to the case, saying, at page 809:

> "The first ground stated by them (petitioner's counsel) is the Fourteenth Amendment, that part of it which relates to due process, but the case shows beyond all question that the Legislature of Massachusetts has done its duty, and the only claim brought to our attention by the petition is that some one —the Attorney-General, the Warden of the State prison or somebody else, is not going to do his duty. Now, beginning with the case of Arrowsmith *v.* Harmoning, 118 U. S., 194, and following down through a long line of cases and also through a line of parallel cases raising the same question but in different forms, it is held that the Fourteenth Amendment does not apply where the fault is incidental, either with the courts or with the officials—therefore, so far as the Fourteenth Amendment is concerned it is clear we have no jurisdiction."

Carrying this principle still further, the case of

Kiernan *v.* Multnomah County, 85 Fed. Rep., 849,

is very much in point. That was a suit by a resident and citizen of the State of Oregon against the Sheriff of Multnomah County to restrain the collection of certain taxes for which the Sheriff had a warrant and under which he threatened to sell complainant's property for unpaid assessments. The substance of the complaint was that the tax and proceedings were not authorized by the law of the State in pursuance of which the Sheriff was acting, and that to permit the sale of the complainant's property in the manner threatened would be to take his property without due or any process of law, &c.

The Court, Bellinger, *J.*, in dismissing the bill of complaint, said, at page 849:

> "*The Fourteenth Amendment has reference exclusively to State action and not to any*

> *action by individuals.* It is a prohibition upon the State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of life, liberty or property without due process of law. *It prohibits State legislation in violation of these rights. It does not refer to any action by private individuals—otherwise every invasion of the rights of one person by another would be cognizable in the Federal courts under this amendment. The question sought to be presented in this case relates to the interpretation to be given the law of the State, and the complaint is that this law is being misinterpreted and misapplied to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite diverse citizenship and amount in controversy to give the Court jurisdiction, the remedy for the injuries complained of is in the State courts.*"

The deduction to be drawn from the cases above cited is clearly that where a State has done its part in providing a proper and due process of law, and its officers exceed the powers granted them by such proper provisions, recourse must be had primarily to the State courts to remedy any wrong done by such officers or to prevent any threatened injury by them, and that until such recourse is had and the State courts have denied relief, it cannot be said that the *State* has denied any one his constitutional rights.

In the case under consideration it is not contended that the building of the tunnel according to the duly adopted "routes and general plan" would have been unlawful in any respect. As the learned Judge below has pointed out (Transcript, p. 71), the Legislature carefully provided in the Rapid Transit Act (Chapter 4, Laws 1891) "for the various steps which make up what is understood to be 'due process of law,'" and if the "routes and general plan" had been strictly followed no one could have been heard to complain. The complainant's claim is, however, that there has been a deviation from the legally

authorized routes, and "that the act of the said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized and the defendants McDonald and Shaler have entered upon the same unlawfully and without authority" (Transcript, p. 11).

In other words, it is claimed that the work as now in progress is being done in *violation* of the careful provisions of the statute, in *violation* of the authority thereby vested in the said board, and without any authority from the State whatsoever. It is not contended that these defendants have even attempted to interpret or apply the act of the Legislature; it is contended that they have *broken* the law of the State.

A case presenting precisely these features was very recently submitted to this Court and the question of jurisdiction was decided in the negative.

State of Missouri *v.* Dockery (not yet reported. Decided Nov. 16, 1903. Opinion by Mr. Justice Holmes).

In that case it was held flatly that *Federal courts will not entertain jurisdiction to prevent acts of State officers done without authority of or contrary to State law. That is for the State courts to remedy.*

In the appellant's brief it is said, at page 34: "It is clear that the Board of Rapid Transit in this case built the subway in Park avenue and took whatever action it did in that regard by virtue of the powers and rights derived from the Rapid Transit Act." But this is not the claim made in the bill of complaint, nor in any of the papers submitted in support thereof. As we have already pointed out, the claim disclosed in the record is that the proceedings in Park avenue were had, not in virtue of powers derived from the Rapid Transit Act, but in direct violation of its plain and specific provisions. The

appellant cannot now alter his position in this regard, but must stand or fall upon the statements contained in the record and not upon those contained in his counsel's ingenious argument.

Furthermore, in order to secure the relief to which he deems himself entitled, the complainant has made parties to this suit, and has asked that an injunction issue against, persons who are in no wise State agencies, and who cannot be said to represent the State in any respect whatsoever. The defendant McDonald is not an officer of the State. He is a contractor whose position in this suit is simply that of a person employed by the municipality to construct a public work, and as such he cannot be said in any respect to represent the State or to be a State agency. The defendant May L. Shaler is the administratrix of a deceased person who was a sub-contractor employed by the defendant McDonald to construct a portion of such public work. These defendants are simply private persons. Any grievance which the complainant may deem himself to have as against these persons, is a grievance of a private person against a private person, and it is impossible to conceive how he can bring them into a Federal court seeking relief on the ground that through them the *State* has deprived him of his property without due process of law.

We are aware that there are expressions in some of the books which at first glance may appear to support the complainant's position with respect to this question of jurisdiction, but we submit, and we believe that we will be able to show, that in not one of the cases in which such expressions have occurred, has a state of facts appeared sufficient to warrant the use of the case as an authority in opposition to the position which we occupy.

In

Virginia v. *Reeves, 100 U. S., 313,*

it is stated broadly that a State may exercise her authority through different agencies, and the prohi-

bitions of the Fourteenth Amendment to the Constitution extend to her action denying equal protection of the laws, whether it be by one of the agencies or by another. This would seem to be in conflict with the authorities above quoted, but in reality it is not. The opinion and the dicta therein contained must of course be read with respect to the facts appearing in the case itself, and when that is done it will appear that the case actually supports the defendants' position. This was an application to this Court *for a writ of mandamus* directing the Judge of the United States District Court of the Western District of Virginia to cause to be redelivered by the Marshal of the District to the jailor of Patrick County, the bodies of two persons then in custody of the said marshal. It appeared that the two persons in custody had been indicted for murder in the County Court of Patrick County, Virginia. The case having been removed into the Circuit Court of the State and brought on for trial, the defendants moved that the *venire*, which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled. Thereupon the defendants before trial filed their petition, duly verified, praying for a removal of the case into the United States Circuit Court on the ground that the petitioners were denied their equal civil rights, in that they were not allowed to have a portion of the jury by which they were to be tried, composed of competent jurors of their own race and color. Their petition was denied, the trial was proceeded with, and the defendants were convicted. The verdicts and judgment, however, were set aside and a motion for the removal of the case was renewed and again denied. The defendants were then tried again separately, one being convicted and sentenced and the jury disagreeing in the other case. A writ of *habeas corpus* was then issued out of the Circuit Court of the United States, by virtue of

which the defendants were taken out of the jail of Patrick County into the custody of the United States marshal, the writ having been granted upon the record of the State court. The State of Virginia then brought this proceeding in the Supreme Court. It appeared that the laws of the State of Virginia were entirely proper with respect to the selection of juries, and the Supreme Court in granting the writ of mandamus said, at page 321:

> "*But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the Statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce in the judicial tribunals of the State the rights which belong to him. In such a case it ought to be presumed the Court will redress the wrong.* If the accused is deprived of the right the final and practical denial will be in the judicial tribunal which tries the case after the trial is commenced. If, as in this case, the subordinate officer whose duty it is to select juries fails to discharge that duty in the full spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given composed of both white and colored citizens neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's right is denied by the State, and cannot be enforced in the judicial tribunals."

Thus it appears that this case is in realty a flat and very strong authority in favor of the defendant's position, and it is very instructive in that it furnishes the line of distinction between it and other cases which may appear to hold to the contrary. The whole theory of the case and of the other cases above cited, is that the violation of State law by a State officer not a judicial officer, which results in

the deprivation of life, liberty or property without due process of law, is not such a deprivation by the State itself, and that until the State courts have denied redress the State cannot be said to have acted, and the powers of the Federal courts cannot properly be invoked.

See also

Gibson *v.* Mississippi, 162 U. S., 565;
Neil *v.* Delaware, 103 U. S., 370;
State of Missouri *v.* Dockery, *supra.*

Bearing in mind the authorities above cited, the distinction between cases appearing to hold to the contrary and the case at bar is easily discernible.

Ex parte Virginia, 100 U. S., 339,

was a criminal prosecution based upon Section 4 of the Act of Congress of March 1, 1875, against one J. D. Coles, Judge of the County Court of Pittsylvania County, Virginia, in which the said Coles was charged with having excluded from juries colored persons on account of their color, and for no other reason. Having been arrested, a petition for a writ of *habeas corpus* was presented to the Supreme Court, which held that the act under which the indictment was found was constitutional, entirely on the theory that he *as a judicial officer* was committing the State to a denial of equal protection of the laws and was, therefore, subject to prosecution under the said act. It will be observed clearly that in this case it was *judicial action* which was complained of and which was said to be the action of the State.

Yick Wo v. *Hopkins, 118 U. S., 356,*

was a case involving the constitutionality of an ordinance of the City of San Francisco, a *legislative act.*

Chi., Bur. & Q. R. R. v. *Chicago, 166 U. S., 226,*

was a writ of error to the Supreme Court of the State of Illinois, and the decision of the United

States Supreme Court was based upon the taking of property without due process of law *through the courts of the State of Illinois.*

In

N. C. & St. L. Ry. v. *Taylor, 86 Fed. Rep., 168,*

the acts of tax equalizers were complained of, but the decision turned upon the impropriety of the *statute* under which the equalizers assumed to act. The Court criticized the statute and held that it was unconstitutional, in that it purported to permit improper acts on the part of the subordinate officers charged with carrying out its provisions.

In

Iron Mountain Co. v. Memphis, 96 Fed. Rep., 113,

the State action complained of was a resolution of a city council, which was about to be followed by the forcible taking of property by the police of the city. This was *legislative action,* taken pursuant to *general powers* delegated by the State legislature, and the Federal courts, therefore, properly entertained the suit to restrain it.

Blake v. *McClung, 172 U. S., 239,*

was a writ of error to the Supreme Court of Tennessee, and the dispute was really over the provisions of a *State statute.*

Scott v. *McNeil, 154 U. S., 45,*

was a writ of error to the Supreme Court of the State of Washington, and the act complained of was the appointment of an administrator of the estate of a living person by a court of probate. Relief was first asked in the State courts, and, having been denied, it was properly granted in the United States Court, and besides the original act complained of was a *judicial act.*

In

Riverside & A. Ry. Co. *v.* City of Riverside, 118 Fed., 736,

and

Vicksburg Water Works Co. *v.* City of Vicksburg, 185 U. S., 65,

the action complained of was action by a municipal legislature.

In

Bancroft *v.* The County Commissioners, 121 Fed., 874,

the act complained of was the taxing of property by commissioners to whom the State had directly delegated the power to tax.

Spring Valley Water Works Co. *v.* San Francisco, 124 Fed., 574,

involved the improper exercise of a power to fix rates to be paid for water supply, directly delegated to local authorities by the Legislature.

In

Missouri Pacific Ry. v. *Nebraska, 164 U. S., 403,*

cited by the appellant, the difficulty was with a *statute*, as construed by the Court of last resort of the State. At page 414, the Court, per Mr. Justice Gray, said:

> " The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case."

The order was, therefore, properly held to be an act of the State. The case cannot possibly fit the case of a violation of State law by its officers.

In

Reagan v. *Farmers' Loan & Trust Co., 154 U. S., 362,*

it appeared that the Legislature of the State of Texas had established a railroad commission and given to

it power to fix reasonable rates. The commission was given a broad discretion to determine what was reasonable. The act provided that the commission might be sued by individuals "in a court of competent jurisdiction in Travis County, Texas." *A citizen of another State* brought the action in a district which embraced Travis County. The Court, per Mr. Justice Brewer, at page 392, found in the provisions of the statute itself, authorization for the bringing of the action in the Federal Court. The question as to whether State action was being challenged was nowhere raised in the case. The Court found the jurisdiction of the Federal Court to lie in the diversity of citizenship and in the provisions of the statute as aforesaid. The citation of this case by the appellant appears to us, therefore, disingenuous.

Pacific Gas Imp. Co. v. *Ellert, 64 Fed. Rep., 421,*

is somewhat more nearly in point than the other cases cited by appellant's counsel, but it, too, is far wide of the mark. There a public board was given power to improve streets. The statute creating the board contained no specific delegation of power to *open* new streets. The board proceeded to lay out a new street, *not in direct violation of its powers, but merely in excess of them.* This was held to be State action. In the case now under consideration the claim is entirely different. It is claimed that the defendants are *violating plain provisions of the State law*, and not only exceeding their powers, *but actually acting in opposition to express prohibitions.* The case falls then, not within the rule applied in *Pacific Gas Imp. Co.* v. *Ellert*, but entirely within that laid down in *State of Missouri* v. *Dockery, supra.*

We confidently assert that there is not a case in the books which may fairly be regarded as an authority opposed to the position which we occupy.

SECOND POINT.

The record does not disclose that complainant has been or will be deprived of any property.

The complainant does not claim to own the fee of any part of the street in which the railroad complained of is being constructed. His claim is that "the risk of injury to his said residence, owing to the work of construction, has become much greater than it would have been had the work been done according to the 'routes and general plan' adopted by the board as aforesaid, and the risk of damage after the railroad shall have been put in operation by reason of the vibration caused by trains or by other objectionable results is in like manner greatly increased; and that such acts will greatly and irreparably injure and damage your orator's said premises, and will interfere with and interrupt, and have already interfered with and interrupted, the lawful use and quite enjoyment of the same and his other easements appurtenant thereto; *that no steps have been taken to acquire said easements; that said unlawful construction has constituted and will constitute an appropriation of the same, and* for the damages he will sustain he has no adequate remedy at law" (Transcript p. 11).

His prayer for relief is "that the defendants * * * be enjoined * * * from further constructing * * * a rapid transit railroad tunnel, or the operation of a railroad therein, under Park avenue adjacent to complainant's said premises, *until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.*"

In other words, he claims (1) that he is being and will be deprived of easements in the street, and (2) that his property adjacent thereto stands in risk of

injury from noise, vibration, &c., when the railroad shall have been put into operation.

The complainant has not ventured to give a name to any easement of which he claims to have been deprived, nor has he attempted to show the extent to which, if at all, the same has been or will be interfered with, nor the manner in which such interference has been or will be accomplished. Indeed, it is impossible for him to do so for the reason that no such easement exists.

It is to be remembered that the structure complained of is a *tunnel under the surface of the street which has not involved and will not involve any disturbance of the surface.*

The Court of Appeals, in the elevated railroad cases, has definitely fixed the property rights of an abutting owner in a New York City street. It has been held that he has actual easements of *light, air and access*, for which compensation must be made if they are appropriated even for a great public utility.

Story *v.* N. Y. El. Ry. Co., 90 N. Y., 122.

It is obvious, however, that none of these rights in the complainant has been or will be interferred with. It cannot be imagined that the light of his house is the light of the nether world; that its air is not the air of heaven; nor that even in his hours of severest aberration he seeks access to his dwelling through any avenue with which a tunnel deeply underground will interfere. What property, then, are we taking from him? The Court of Appeals say *none*. They say that they stretched the law to the very breaking point in establishing the easements of light, air and access, and they have steadfastly declined to stretch it any further. In language clear and unmistakable they have laid it down that an abutting owner has no easement of quiet, none of freedom from vibration, none of privacy, and none of any sort save only those of *light, air and access.*

The following authorities leave no room for doubt on this point:

Am. Bk. Note Co. *v.* N. Y. E. R. R. Co., 129 N. Y., 252.

This case was the ordinary elevated railroad case, *i. e.*, an action for an injunction or in lieu thereof compensation for easements taken and damage suffered. The Court below made an award for *fee* damage, a portion of which was specifically stated to be in compensation for damage suffered from *noise*.

The Court, Finch, *J.*, following the former N. Y. cases, held that for property taken compensation must be made. Reference was made to the constitutional provision against the taking of property without due process of law. It was held that *easements* taken were *property* taken, and the Court then proceeded to enquire whether the making of noise constituted the taking of an easement. At page 271 the Court said:

> "What the elevated roads take from the abutter are his easements of *light, air and access.* * * * Now, the elevated roads take no land from the abutter. They stand wholly upon the land owned by the municipality, and no consequential damages flowing from the lawful corporate user could be recovered but from the fact that some of them, though not all of them, have been by the Story case transformed from consequential injuries into invasions of property rights. To the extent of that transformation the rule of damages must feel the effects of the change, but beyond that the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutter, instead of leaving them, where the Story case left them, the mere incidents of a lawful use. In the Drucker case the full extent of the transformation bringing with it

> the liability for damages was sketched in these words: 'Smoke and gases, ashes and cinders affect and impair the easement of air; the structure itself and the passage of cars lessen the easement of light; the drippings of oil and water and possibly the frequent columns interfere with the convenience of access'; but there is no hint of any allowable recovery beyond what *pro tanto* constituted some elements of the taking. In the Lahr case, Ruger, *Ch. J.*, was equally guarded, saying that the incidental injuries could be recovered 'provided the evidence established the fact that they were destructive of the easements of light, air and access,' and these careful expressions were used although neither case involved a question of fee damages. I am averse to adding to the abutter's easements by changing their name and doing indirectly what I am sure none of us would do directly."

The cases cited by Justice Finch in the extract above quoted are

Story *v.* N. Y. El. Ry. Co., 90 N. Y., 122.

Lahr *v.* Met. E. R. Co., 104 N. Y., 268.

Drucker *v.* Man. R. Co., 106 N. Y., 157.

Bischoff *v.* N. Y. E. R. R. Co., 138 N. Y., 257:

In this case the subject as to whether plaintiff had any easements of privacy or quiet was discussed. Andrews, *Ch. J.*, at page 262, said:

> "*The property rights of an abutting owner consist of easements of light, air and access. There are no easements of privacy or quiet, or other easements than those mentioned, for which compensation can be claimed.*"

Messenger *v.* M. R. Co., 129 N. Y., 502:

Here it was held that an abutting owner has no easement of quiet or privacy, nor any easement which entitles him to the use of a street for the pur-

pose of having the exterior of his premises conspicuously visible from the other side of the street.

Noise, vibration, invasion of privacy and the like, have been held to be elements of damage in the elevated railroad cases, to be sure, but never on the theory that property was thereby taken or property rights thereby invaded. In such instances the relief has always been granted by way of compensation for *past damages* and on the theory that until the actual acquisition of the easements of light, air and access, the elevated roads were trespassers upon them and therefore liable for all the consequential damages flowing from the trespass. This is made perfectly clear in

Am. Bk. Note Co. *v.* N. Y. E. R. Co., 129 N. Y., 252.

There Finch, *J.*, at page 269, said:

> "We have already decided that in an action at law for the wrong done to abutters and in which past damages only are sought, the elevated roads are liable for the noise of their trains, upon the ground that they are trespassers and responsible for all injuries resultant from their wrongful act."

In Moore v. N. Y. E. R. R. Co., 130 N. Y., 523, Bradley, *J.*, at p. 527, said:

> "It seems well established that the theory upon which an action at law may be supported by an abutting owner against the defendant is, that they are in such sense trespassers or wrongdoers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road (Lahr *v.* M. E. R. Co., 104 N. Y., 269; Drucker *v.* M. R. Co., 106 *Id.*, 157; Kane *v.* V. N. Y. E. R. Co., 125 *Id.*, 164, 186). In the latter case and in the more recent one of American Bank Note Co. *v.* N. Y. E. R. Co. & M. Ry. Co. (129 N. Y., 252), it was held that *while such relation of trespasser continued* the defendants were

liable to the abutting owner for the damages occasioned to him by the noise of operating the roads."

See cases cited in the extract quoted and also

Sperb *v.* M. E. R. Co., 137 N. Y., 155.

Bischoff *v.* N. Y. E. R. R. Co., 138 N. Y., 257.

Messenger *v.* M. R. Co., 129 N. Y., 502.

The cases cited undoubtedly expose sound law, but even if they did not, this court would not attempt to interfere with the decisions of the court of last resort of the State of New York with respect to what constitutes property, or what, under the laws of that State constitutes "a taking, an injury, or a destruction thereof."

Marchant *v.* Penn. R. R., 153 U. S., 380, 385.

Since the complainant has been deprived of no easement, and since he does not own the fee of any part of the street, there has been no taking of property from him through the mere addition of another burden to the uses to which the street has formerly been put.

Meyer *v.* The City of Richmond, 172 U. S., 82:

This case carefully reviews the authorities on this question, and sets at rest any doubt there may have been concerning it.

See also

Gibson *v.* The United States, 166 U. S., 269.

Eldridge *v.* Trezevant, 160 U. S., 452, 468.

Guthrie on the 14th Amendment, page 94.

There is nothing left, then, of the complainant's claim except his fear of damage to his property

abutting on the street, through the operation of the road. He does not claim that this amounts to, or will amount to, a taking of his property, and indeed the law declares that it will not.

In 1881 the Pennsylvania Railroad built an elevated structure for the support of its tracks through a street in Philadelphia. Such structure directly interfered with the access of one Miller to his premises abutting upon the street. It did not interfere with the access of one Marchant to his premises situated on the opposite side of the street, but damaged said premises through the noise, smoke and dust which the operation of the railroad produced. Miller was allowed to recover in the State courts of Pennsylvania, and, the case having been taken to this Court by writ of error, the judgment was affirmed. Marchant sued in the State courts and failed to recover. He obtained a writ of error to this Court claiming that he had been deprived of his property without due process of law, and this Court again affirmed the judgment of the State courts.

> Pennsylvania R. R. Co. *v.* Miller, 132 U. S., 75.
>
> Marchant *v.* Pennsylvania R. R. Co., 153 U. S., 380.

In the Marchant case the Court, per Mr. Justice Shiras, at page 389, in contrasting a series of cases similar to the Miller case with that under discussion, said:

> "The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property."

In other words, while it is a taking of property to deprive a man of access to his land, it is not a taking

of property to inflict injury upon his premises as a consequence of the use of other premises. Such injury may amount to actionable wrong, but if so, the remedy lies in the State Courts in the ordinary action to abate, or to recover damages sustained through, the maintenance of a nuisance, and not in the Federal Courts on the theory that every actionable damage to property amounts to a taking of property.

It seems clear, then, that the record does not disclose any *State action, nor any taking of property.*

THIRD POINT.

The decree should be affirmed.

Respectfully submitted,

DELANCEY NICOLL,
PRATT A. BROWN,
Counsel for Appellee McDonald.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES T. BARNEY,
Appellant,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,
Appellees.

No. 159.

BRIEF FOR THE APPELLEES, THE RAPID TRANSIT BOARD AND ITS MEMBERS.

EDWARD M. SHEPARD,
Of Counsel for Rapid Transit Board and its Members,
New York City, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 159.

CHARLES T. BARNEY,
Appellant,

versus

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,
Appellees.

Brief for Appellees, the Rapid Transit Board and Commissioners forming it.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing the complainant's bill for want of jurisdiction.

All of the parties are citizens of the State of New York.

The Appellee, the City of New York, is building a rapid transit railroad under some of its streets. The Rapid Transit Board, another Appellee, having, in behalf of the City, devised the Routes and General Plan for the work,—made a

contract for its performance with the Appellee, McDonald, and is now in supervising control of the work,—all under the authority of the Rapid Transit act of the State, chapter 4 of its laws of 1891 as amended.* Park Avenue is one of the north and south streets under which the railroad was authorized and is being built. Such Routes and General Plan were prescribed by the Rapid Transit Board by resolutions adopted on 14th January and 4th February, 1897, in pursuance of such rapid transit act (Bill of Complaint, *p.* 7).

The Appellant, the complainant below, is the owner of the premises at the northeast corner of Park Avenue and 38th Street and is, therefore, an abutting owner on the easterly side of the rapid transit route. The Routes and General Plan, having been thus prescribed by the Rapid Transit Board, received in pursuance of the rapid transit act the assent of the local authorities and of the Appellate Division of the Supreme Court in lieu of the consent which a majority in value of the property owners had refused. The Appellant himself, according to the allegation of his bill (*p.* 7),

> "*consented* to the construction of the said "rapid transit railroad in accordance with the "said Route and General Plan of construction "and did not oppose the proceedings herein- "after mentioned which the said Board of "Rapid Transit Railroad Commissioners in- "stituted for the purpose of obtaining the de- "termination of three commissioners appoint-

*Amended by chaps. 102 and 556 of the laws of 1892, chaps. 528 and 752 of the laws of 1894, chap. 519 of the laws of 1895, chap. 729 of the laws of 1900, chap. 587 of the laws of 1901 and chaps. 533, 542, 544 and 584 of the laws of 1902.

"ed by the said Appellate Division that such "rapid transit railroad ought to be construct- "ed and operated; nor did your orator oppose "the confirmation of said determination by the "said Appellate Division."

The Appellant alleged, however, that the portion of the railroad under Park Avenue and in front of his premises, and which is called the "*easterly tun- "nel section*," was being built 27 feet nearer to his premises than was authorized by the Routes and General Plan; and that the work (Bill, *p.*10) was—

"being thus performed by said defendant, "McDonald, and the said Shaler (the contract- "ors) *without any authority* other than certain "directions given by the chief engineer em- "ployed by the Board of Rapid Transit Com- "missioners and embodied in certain so-called "working drawings or detail drawings pre- "pared by him or at his instance and recently "approved informally by said Board.

"And * * * that the fact that such "directions had been given by the chief "engineer and that said work was being "thus performed by the contractor, as "aforesaid, was not until recently specifically "known to said Board; that such action of said "chief engineer and contractor has never "been formally or specifically approved by "said Board; that there has been no change "made or authorized by said Board in the said " 'Routes and General Plan,' nor has there "been any modification of the contract or spec- "ifications with reference to the construction "of that part of the tunnel lying under Park "Avenue between 33rd and 41st Streets; that "no notice was given to any of the property

"owners along said street that it was proposed "by the defendants or any of them to change "the position of the tunnel to any material ex- "tent from the position shown and described "in the said 'Routes and General Plan,' nor "was any opportunity ever given to said prop- "erty owners or the citizens generally to be "heard with respect to any such change."

The complainant claimed, therefore (Bill, *p.* 11),

"*that at none of the times herein mentioned* "*did the said Board * * * have authority* "(if at all) to enter into any contract for the "construction of any rapid transit railroad "under or upon the said Park Avenue *except* "*in accordance with the said 'Routes and Gen-* "*'eral Plan,' * * ** and *that at no time did* "*the said Board have authority* to prepare de- "tailed plans or specifications, *except* (if at "all) *in accordance with the said general plan* "*of construction, or to alter any plans* or spec- "ifications prepared by them *excepting in ac-* "*cordance with said general plan of construc-* "*tion.* That the act of the said Board in "permitting the defendants McDonald and the "said Shaler to enter upon *that part* of Park "Avenue * * * *where the tunnel is now in* "*process of construction as aforesaid was ille-* "*gal and unauthorized* * * * and * * * "that the construction of the rapid transit "railway on the easterly side of Park Avenue "in front of your Orator's said premises, takes "his property without due process of law."

The complainant prayed an injunction against the construction of the easterly tunnel section in front of his premises. (Bill, *p.* 12).

Upon his bill and upon affidavits the complain-

ant-appellant moved for an injunction *pendente lite*. This motion was resisted by the defendants who, pursuant to a stipulation (*pp.* 72-73) submitted in opposition their affidavits in the case brought by Arabella D. Huntington against the same defendants (*pp.* 49-72). The Huntington case is now before this Court upon a like question of jurisdiction, as No. 173 of this Term.

The defendants-appellees sought upon the motion (their affidavits, *pp.* 51-54, 60-62), to show that the construction *was* within the description of the Routes and General Plan and *was* therefore duly authorized by the Rapid Transit legislation. The court below was of opinion that the defendant's construction was not within the Routes and General Plan or authorized by the legislation under which the defendants acted (Opinion at *p.* 41, adopting the opinion in the Huntington case, *pp.* 67-72); and for that very reason held that the act of the defendants, as being thus unlawful and unauthorized, was not an act of the State of New York and that, therefore, the court had no jurisdiction.

On its own motion under sect. 5 of the Act of March 3, 1875 (Chap. 137), the court below thereupon entered a decree dismissing the bill of complaint "for the reason that such suit does "not really substantially involve a dispute or con- "troversy properly within the jurisdiction of this "court" (*p.* 75); and it has certified to this Court the following question (*p.* 42):

> "Is this court (the Circuit Court) with- "out jurisdiction of this cause for the reason

> "that the acts of the defendants in building "and constructing the easterly portion of the "tunnel in Park Avenue in the City of New "York were not acts of the State of New York "to which the prohibition of the Fourteenth "amendment of the Constitution of the United "States which provides that no State shall " 'deprive any person of life, liberty or prop- " 'erty without due process of law' has ap- "plication?"

The matters to be argued here are, of necessity, the two following:

1. Was the construction of the easterly tunnel section under Park Avenue, at the place where it was constructed, an act of the State of New York?

2. Did such construction deprive the complainant of property without due process of law?

Preliminary Statement of Law.

The nature of the defense is immaterial. The Appellees do not, therefore, argue here, as they would if the merits were before this Court, that the learned judge below was wrong in thinking, as he apparently did, that, if the defendants established the absence of merit in the complainant's cause, their success would anomalously establish the jurisdiction of the court against them. The complainant must by the allegations of his own bill, present a case within the jurisdiction of the court below (*Defiance Water Co.* v. *Defiance*, 191 U. S., 184).

If the allegations of the complainant's bill be assumed,—and here and now they must be assumed,—to be true, then the construction of the easterly tunnel section was not an act of the State of New York.

For, in this matter, the City of New York acts solely by the Rapid Transit Board. And the State has given the Board no general authority over streets or over rapid transit or any general authority whatsoever. The language quoted by the Appellant from section 1 of the Rapid Transit Act, conferring upon the Board "such other and necessary "powers as may be requisite to the efficient per- "formance of *the duties imposed upon said Board*" by the act obviously does not enlarge the scope of the duties. Those duties must be distinctly marked out before there can be any question as to what is incidental to them. The Appellant's argument below was,—and the whole tenor of his bill now is,—that the construction of the easterly tunnel section was entirely beyond the power vested by the laws of New York in the Rapid Transit Board or the Contractors. It was not contended by either party,—nor do the provisions of the rapid transit act permit the contention,—that the Board, as an incident to the construction of a tunnel or tunnel section which *was* authorized, could construct an entirely distinct and different tunnel or tunnel section which was *not* authorized.

If, as the complainant alleged, the easterly tunnel section as constructed in front of his premises were not within the Routes and General Plan which had been prescribed by the Rapid Transit Board

and approved by the local authorities and the Supreme Court,—but was something entirely distinct and in a different place,—then clearly the construction was not authorized by the State or by any representative of the State. The Board was a sheer creature of statute. It had no constitutional power and no power of any kind except what was strictly and jealously prescribed for it. Section 4 of the Rapid Transit Act* gave it the power to prescribe the routes and general plan of any proposed rapid transit railroad within this City. Every such general plan was required by that section

> "to contain such details as to manner of con-
> "struction as may be necessary to show the
> "extent to which any street, avenue or other
> "public place is to be encroached upon and the
> "property abutting thereon affected."

The same section required that the consent of the "local authorities having control of "that portion of a street or highway upon which "it is proposed to construct or operate such rail-"way or railways be first obtained;" and further required a corresponding consent of the owners of a majority in value of the abutting property, or if their consent could not be obtained, then in lieu thereof, the consent of the Appellate Division of the Supreme Court. The details of the procedure to obtain the consent of the local authorities and of the property owners, or, in lieu of the latter, the consent of the Appellate Division, were carefully set out in section 5 of the Act.† It required

*Sect. 4 of chapter 4 of the laws of 1891 as amended by chapter 616 of the laws of 1896 (that amendment including all other amendments under this section).

†Sect. 5 of chapter 4 of the laws of 1891 as amended by sect. 2 of chapter 519 of the laws of 189 .

the Board to send to the Common Council of the City "a copy of said plans and conclusions as adopted." It required the consent of the common council of the City "to the construction of a "railway or railways" in accordance with "such "plans and conclusions," and also the approval of the Mayor of the city or, if he should veto an approval by the common council, then the approval "by a two-thirds vote of all the mem- "bers of the Common Council." The same section further provided that "upon obtaining "the approval and consent of the local au- "thorities as above provided," the Rapid Transit Board should "take the necessary steps to ob- "tain if possible the said consents of the prop- "erty owners along the line of the said route "or routes," (that is to say "the consent of the "owners of one-half in value of the property bounded on" the streets as provided in section 4* of the act). If such consents could not be obtained, section 5 required the Board to make application to the Appellate Division of the Supreme Court of the State "for the appointment of three com- "missioners to determine and report after due "hearing whether such railway ought to be con- "structed operated." The same section further provided that, if such commissioners should determine "after public hearing of all par- "ties interested" that the road ought to be constructed and operated, then such report, when confirmed by such Appellate Division, should be taken

*Sect. 4 of chap. 4 of the laws of 1891 as amended by sect. 1 of chap. 519 of the laws of 1895 and chap. 616 of the laws of 1900.

in lieu of the consent of the majority of the property owners.

Section 6* of the act provided that

> "when the consent of the local authorities "and the property owners, or in lieu thereof, "the authorization of the said General Term "(Appellate Division) of the Supreme Court "upon the report of commissioners, shall have "been obtained, the board of rapid transit "railroad commissioners shall at once proceed "to prepare detailed plans and specifications "for the construction of such rapid transit "railway or railways in accordance with the "general plan of construction."

Section 6 further provided that

> "the board may from time to time alter such "detailed plans and specifications *but always* "*so that the same shall accord with the gen-* "*eral plan of construction.*"

And the requirement of the consent of local authorities and of the majority of abutting property owners was made mandatory by sec. 18 of art. 3 of the Constitution of the State of New York adopted in 1894 (this provision having been originally adopted by the People of the State in 1874) as follows:

> "No law shall authorize the construction "or operation of a street railroad except upon "the condition that the consent of the owners

*Sect. 6 of chap. 4 of the laws of 1891 as amended by sect. 1 of chap. 729 of the laws of 1896. There was a later amendment made by chap. 542 of the laws of 1902; but that dos not affect the present controversy.

"of one-half in value of the property bounded "on and the consent also of the local authori- "ties having the control, of that portion of "a street or highway upon which it is pro- "posed to construct or operate such railroad "be first obtained, or in case the consent of "such property owners cannot be obtained, "the General Term" (changed in 1894 to Appellate Division) "of the Supreme Court in "the department in which it is proposed to be "constructed, may, upon application, appoint "three commissioners who shall determine, "after a hearing of all parties interested, "whether such railroad ought to be con- "structed or operated, and their determina- "tion, confirmed by the court, may be taken "in lieu of the consent of the property "owners."

The present counsel has already argued in *Underground Railroad* v. *City of New York* (No. 150 of October Term, 1903) that this provision is strictly applicable to a railroad under streets and cited the decision to that effect of the Court of Appeals of the State in *Matter of New York District Railway Company, 107 N. Y., 42.* Nor do the present Appellant's counsel dissent from this statement.

The Appellant's bill alleged (*p.* 4) that

"on or about the 6th day of November, 1894, "it was determined by vote of the people of "the City of New York as provided in sections "12 and 13 of chap. 752 of the laws of 1894, "that a rapid transit railway or railways "should be constructed for and at the expense "of said city, and thereupon various proceed- "ings were had by the said Board assuming

"to act under the statutory provisions herein-
"before referred to for the purpose of deter-
"mining a route or plan of construction for
"such rapid transit railway."

Section 34* of the Rapid Transit act, referring to such a determination, provided that

"In case the people shall determine by vote
"* * * that any such railway or railways
"shall be constructed for and at the expense
"of such city, then and in that event it shall
"be the duty of said board to consider the
"routes, plans and specifications, if any, pre-
"viously laid out and adopted by them or
"their predecessors and for which *the con-*
"*sents have been obtained referred to in sec-*
"*tion five of this act;* and either to proceed
"with the construction of such railway or rail-
"ways * * * or to change and modify the
"said routes, plans or specifications in such
"particulars as to said board may seem to be
"desirable; or from time to time and with or
"without reference to former routes or plans
"to adopt other or additional routes, plans
"and specifications for such railway or rail-
"ways, provided always that, in all cases in
"which any such change or modification shall
"be of such character as to require the con-
"sents thereto referred to in section five of
"this act, and *in all cases* where other or dif-
"ferent routes or general plans may have
"been so adapted, *the said board shall pro-*
"*ceed to secure the consents required to be*

*This was a new section originally added to chap. 4 of the laws of 1891 by sect. 9 of chap. 752 of the laws of 1894. It was amended by sect. 3 of chap. 729 of the laws of 1896 and by chap. 616 of the laws of 1900. There was a further amendment by chap. 544 of the laws of 1902; but that amendment is immaterial to the present controversy.

"*obtained by section five of this act as therein*
"*set forth.* * * * As soon as such con-
"sents where necessary shall have been ob-
"tained for any rapid transit railroad or rail-
"roads and the detailed plans and specifica-
"tions have been prepared, as provided in sec-
"tion six of this act, the said board for and in
"behalf of said City shall enter into a con-
"tract * * * for the construction of such
"road or roads *upon the routes and in accord-*
"*ance with the plans and specifications so*
"*adopted* * * *."

Section 38* of the Rapid Transit act provided that the Rapid Transit Board might, with the concurrence of six of its members and the consent in writing of the sureties of the contractor, agree with the latter upon changes

"of the plans and specifications upon which
"said road or roads is or are to be con-
"structed; *but* NO CHANGE OR MODIFICATIONS
"IN THE PLANS AND SPECIFICATIONS CONSENTED
"TO AND AUTHORIZED PURSUANT TO SECTION FIVE
"OF THIS ACT SHALL BE MADE WITHOUT THE
"FURTHER CONSENT AND AUTHORIZATION PRO-
"VIDED FOR IN SAID SECTION."

It is thus plain that the State of New York by its constitution and by the act which created the Rapid Transit Board strictly limited the power of the Board in the laying out of routes or the adoption of a plan for a Rapid Transit railroad by the requirement that the route and "the "extent to which any street, avenue or public place "is to be encroached upon" should be approved not

*This was a new section added to chap. 4 of the laws of 1891 by sect. 9 of chap. 752 of the laws of 1894 and was amended by sect. 13 of chap. 519 of the laws of 1895.

only by the Board, but by the local authorities (the Common Council and the Mayor) and by the majority in vaue of the abutting owners or in their place by the Appellate Division of the Supreme Court. It is likewise clear that the Board had no power to make,—but on the contrary, were prohibited to make,—any change in the routes or general plan after the same were adopted except with the like consent to any additional or different use of the streets for the purposes of the railroad.

If the construction of the easterly tunnel section under Park Avenue to which the complainant-appellant objects, had been consented to by the local authorities and by the abutting property owners or the Supreme Court, then according to the bill of complaint, there would be no objection to the construction. Indeed, as has been pointed out (*supra, p.* 2), the Appellant himself consented to this railroad upon the Routes and General Plan which were adopted. The objection, and the only objection,—lies in the supposed fact, asserted by the complainant, that the easterly tunnel section, as actually constructed, is not within the Routes and General Plan consented to by the local authorities and the Supreme Court.

Therefore it was that the complainant brought this suit. Its gravamen is the assertion that what the Rapid Transit Board did or what was done by the contractor (for the allegation of the bill, at page 10, is that the Board did not know the deviation or formally or specifically approve it) was without the authority and in defiance of the prohibition, of the legislature of the State of New York. So at page 11 the allegation of the bill was

"that at none of the times herein mentioned
"did the said Board of Rapid Transit Railroad
"Commissioners have authority (if at all) to
"enter into any contract for the construction
"of any rapid transit railroad under or upon
"the said Park Avenue, except in accordance
"with the said 'routes and general plan' con-
"tained in the said resolutions of January 14
"and February 4, 1897, and * * * that
"the act of the said Board in permitting the
"defendants McDonald and the said Shaler to
"enter upon that part of Park Avenue between
"Thirty-third and Forty-first streets, where
"the tunnel is now in process of construction,
"as aforesaid, was illegal and unauthorized,"

—obviously meaning unauthorized by the laws under which the Rapid Transit Board assumed to act.

I.

Upon the allegations of the bill of complaint which are here controlling the court below was without jurisdiction.

FIRST.

The defendants (the Appellees here) have strenuously insisted and, wherever the question is properly before a court, will continue to insist, that the easterly tunnel section under Park Avenue was within the Routes and General Plan. But the bill of complaint clearly affirms the contrary. And it is upon the basis of that affirmation that we are before this court. The complainant's affirmation has the support of three rulings of the Supreme Court of the State of New York which

are cited here,—not of course as facts,—but as authorities to what has thus far been held to be the law of New York in a case like this.

Barney v. *Rapid Transit Board*, 38 Misc. Rep. (N. Y.) 549: That suit was brought by the present complainant-appellant in the State court. There is as yet no final decree in the cause; but it was heard upon a motion for an injunction *pendente lite;* and upon that motion the State Court said by GIEGERICH, *J.*, at *p.* 549:

> "The gravamen of the action is the alleged "unlawful act of the defendants in so direct- "ing the construction of the rapid transit "tunnel under Park Avenue between 34th and "42nd Streets that the easterly wall of the "tunnel is made to follow a line distant only "seven feet from the building or house line "of the street, it being claimed that in the plan "of construction adopted there is a substan- "tial departure from the maps and descrip- "tions prepared by the board of rapid transit "commissioners in accordance with the "statute which created their powers, the "legality of their acts in causing the build- "ing of a tunnel being dependent upon their "following the scheme of construction outlined "or described in these maps and descriptions "styled for the purposes of the case 'routes "'and general plan.' * * * I think, there- "fore, that no reasonable interpretation of the "'routes and general plan' could afford room "for justifying the extraordinary change in "the position of the tunnel as constructed "from the line described in the lawfully ap- "proved plan of construction as to this par- "ticular locality. The fact being found that

> "the work of building the tunnel at the point "in question is prosecuted without legal "authority, there is technical support for the "plaintiff's action."

The injunction *pendente lite* was refused partly because the action was brought by the plaintiff as a taxpayer, and the court would not sustain it in view of the enormous loss to the City if the action were sustained, and also because, as was said by GIEGERICH, *J.*, at *p.* 550,

> "It may be that before this action is "brought to trial, any illegality which exists "will be removed."

The reference was here to a modification of the Routes and General Plan by the consents of local authorities and the Appellate Division so as to validate the easterly tunnel section. We conceive it to be proper to suggest to this Court, merely as illustration of the sufficiency of State authority,—even from the Appellant's standpoint,—that such proceeding has been taken, that the consent of the local authorities has been obtained and that upon the refusal of the abutting property owners to consent, the necessary application has been made to the Appellate Division of the Supreme Court which has appointed commissioners before whom the hearing is now pending.

Barney v. *City of New York*, 39 Misc. Rep. (N. Y.), 719: This was a second suit brought in the State Court by the present complainant-appellant, now dropping the character of an aggrieved taxpayer. Again no final decree has been entered. But

it was held by the Supreme Court of the State upon an application for an injunction *pendente lite*, that the construction was unlawful, the Court saying by LEVENTRITT, *J.*, at *p.* 721:

> "That the present construction is unauthor-
> "ized must be conceded."

Here again the preliminary injunction was refused, on the ground that the Court preferred to wait for final hearing, and also in view of the prospective validation of the position of the easterly tunnel section.

A still more important authority to the absence of State warrant for the easterly tunnel section is the decision of the APPELLATE DIVISION of the State Supreme Court upon appeal affirming Judge LEVENTRITT's decision in the last cited case. A copy is printed as an APPENDIX to this brief.

For the purposes of this case, therefore, it must be assumed that the construction complained of by the Appellant is in violation of the laws of New York and without any authority from the State of New York. So that the controversy is one between parties all of whom are citizens of the State of New York in the course of which the sole question is whether the laws of that State have or have not been violated by the acts of the defendants. Such a controversy, as we submit, belongs to the courts of the State itself.

Arrowsmith v. *Harmoning, infra.*
Virginia v. *Rives, infra.*
St. Joseph & Grand Island Co. v. *Steele*, 167 U. S., 659.
Hartell v. *Tilghman*, 99 U. S., 547.

SECOND.

Nevertheless the Appellant sees fit in his argument to impute to the State of New York the acts of Rapid Transit Commissioners which the Appellant affirms, and with authority, are in defiance of the laws of New York. For Appellant's bill alleges, as we have shown, facts which are tantamount to an affirmation that the acts of the Appellees are without any authority of the State; and against those acts its courts have thus pronounced.

The fact that the Rapid Transit Commissioners have some duties and powers in the construction of a rapid transit railroad does not commit the State, or begin to commit the State, to any acts of theirs in plain excess of their authority. It will hardly be disputed that, if the Rapid Transit Board, proceeding under these Routes and General Plan, had sought to construct a rapid transit railroad under Broadway instead of Park Avenue or to construct a rapid transit railway under a street of Buffalo, their act would be absolutely without authority, in defiance of the law, and in no way the act, of the State. But the rigorous provisions of law already quoted make it clear that the placing of the tunnel of a rapid transit railroad under a part of the street not within the Routes and General Plan is as clear a violation of law as to place a railroad in an entirely different street or in a different city.

THIRD.

Although the prohibition of the Fourteenth Amendment runs against the State and the State

alone, we do not dispute that the State may act by executive officers as well as by its courts or its legislature or the force of the principle originally stated for this Court by Mr. Justice STRONG in *Ex parte Virginia*, and repeated by this Court in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S., 226, at *p.* 223, that

> "the prohibitions of the amendment refer to "all the instrumentalities of the State, to its "legislative, executive and judicial author- "ities. And therefore whoever by virtue of "public position under a State government "deprives another of any right, protected by "that amendment against deprivation by the "State, violates the constitutional inhibition; "and *as he acts* in the name and *for the State* "*and is clothed with the State's power*, his act "is that of the State."

The Court was there dealing with a final judgment of a State court which it held must be deemed "the act of the State" within the meaning of the amendment. The rule clearly implies that the act of the officer becomes the act of his State, only if he is "clothed with the State's power" to do the act, that is to say, if what he does is done "by virtue of public authority" of the State. The Amendment undertakes to curb the State, through whomsoever or however it may act; but it does not run against subordinate agents of the State to prevent them from flagrantly defying State authority. So it is that, where a person being a public officer seizes property,—acting not *virtuti officii* but *colore officii* and without lawful right, the claim lies against him individually and not

against the State or other government of which he was a public officer.

Tindal v. *Wesley*, 167 U. S., 204.
U. S. v. *Lee*, 106 U. S., 196.
Cunningham v. *Macon & Brunswick R. R.*, 109 U. S., 446, 452.
Stanley v. *Schwalby*, 147 U. S., 508, 518.
Stanley v. *Schwalby*, 162 U. S., 255, 271.
Belknap v. *Schild*, 161 U. S., 10.

The grievance complained of, as Mr. Guthrie very well puts it in his "Lectures on the Four-"teenth Amendment" (*p.* 72), "must be sanc-"tioned by a State statute or some other form of "State authority," and the Amendment "does not "confer jurisdiction to correct the erroneous or "wilfully improper acts of State officers or courts "in violation or disregard of law."

Virginia v. *Rives*, 100 U. S., 313: This authority is cited by our adversaries, but we submit that its doctrine is fatal to their contention. For the Court said by Mr. Justice STRONG, at *pp.* 319, 321, 322.

> "It is evident, therefore, that the denial or "inability to enforce in the judicial tribunals "of a State, rights secured to a defendant by "any law providing for the equal civil rights "of all persons citizens of the United States, "of which sect. 641 speaks, is primarily, if "not exclusively, a denial of such rights, or an "inability to enforce them, resulting from the "constitution or laws of the State, rather "than a denial first made manifest at the trial "of the case. In other words, the statute has

"reference to a legislative denial or an in-
"ability resulting from it. * * *

"When a statute of the state denies his
"right, or interposes a bar to his enforcing it,
"in the judicial tribunals, the presumption is
"*fair that they will be controlled by it* in their
"decisions; and in such a case a defendant
"may affirm on oath what is necessary for a
"removal. Such a case is clearly within the
"provisions of sect. 641. *But when a subor-*
"*dinate officer of the State, in violation of*
"*State law, undertakes to deprive an accused*
"*party of a right which the statute law ac-*
"*cords to him, as in the case at bar, it can*
"*hardly be said that he is denied, or cannot*
"*enforce, 'in the judicial tribunals of the*
"*'State' the rights which belong to him. In*
"*such a case it ought to be presumed the court*
"*will redress the wrong.* If the accused is
"deprived of the right, the final and practical
"denial will be in the judicial tribunal which
"tries the case, after the trial has commenced.
"If, as in this case, the subordinate officer
"whose duty it is to select jurors fails to dis-
"charge that duty in the true spirit of the
"law; if he excludes all colored men solely be-
"cause they are colored; or if the sheriff to
"whom a *venire* is given, composed of both
"white and colored citizens, neglects to sum-
"mon the colored jurors only because they are
"colored; or if a clerk whose duty it is to take
"the twelve names from the box rejects all the
"colored jurors for the same reason,—it can
"with no propriety be said the defendant's
"right is denied by the State and cannot be
"enforced in the judicial tribunals. The
"court will correct the wrong, will quash the
"indictment or the panel, or, if not, the error
"will be corrected in a superior court. We

> "cannot think such cases are within the pro-
> "visions of sect. 641. Denials of equal rights
> "in the action of the judicial tribunals of the
> "State are left to the revisory powers of this
> "Court."

Arrowsmith v. *Harmoning*, 118 U. S., 194: There the plaintiff alleged that he had been deprived of his property without due process of law and therefore invoked the federal jurisdiction. The property which he said was wrongfully taken from him had been sold in a proceeding in a probate court of Ohio by a special guardian who had not given a bond such as was required by the law of Ohio. The plaintiff having been defeated in the Supreme Court of Ohio to which he carried his case, brought it here by writ of error; and the judgment was affirmed, this Court saying by Chief Justice WAITE (*p.* 196):

> "Certainly a state cannot be deemed guilty
> "of a violation of its constitutional obliga-
> "tion simply because one of its courts while
> "acting within its jurisdiction has made an
> "erroneous decision. The legislature of a
> "state performs its whole duty under the con-
> "stitution in this particular when it provides
> "a law for the government of its courts while
> "exercising their respective jurisdictions
> "which, if followed, will furnish the parties
> "the necessary constitutional protection."

Kiernan v. *Multnomah Co.*, 95 Fed. Rep., 849: The complainant in this case, being a citizen of Oregon, sued the sheriff of one of the counties of that state to restrain the collection of certain taxes for which the sheriff had a warrant under which

he threatened to sell the complainant's property. His bill showed that the tax and the proceedings under which the sheriff threatened to act, were not authorized by state law, and alleged that a sale by the sheriff would be a taking of property without due process of law and, therefore, in violation of the Fourteenth Amendment. The court dismissed the bill for want of jurisdiction, saying at page 849:

> "The Fourteenth Amendment has reference "exclusively to state action and not to any ac- "tion by individuals. It is a prohibition "upon the state 'to make or enforce any law " 'which shall abridge the privileges or im- " 'munities of citizens of the United States' or "which shall 'deprive any person of life, lib- " 'erty or property without due process of " 'law.' It prohibits state legislation in vio- "lation of these rights. It does not refer to "any action by private individuals (*Virginia* "v. *Rives*, 100 U. S., 318; *U. S.* v. *Cruikshank*, "92 U. S., 542; *Civil Rights Cases*, 109 U. S., "11, 3 Sup. Ct., 18); otherwise every invasion "of the rights of one person by another would "be cognizable in the federal courts under this "amendment. The questions sought to be "presented in this case relate to the interpre- "tation to be given a law of the state, and the "complaint is that this law is being misin- "terpreted and misapplied to the injury of the "plaintiff in his rights of property. In all "such cases, where there is not the requisite "diverse citizenship and amount in contro- "versy to give the court jurisdiction, the "remedy for the injuries complained of is in "the state courts."

Re Storti, 109 Fed. Rep., 807: The ruling here was made by Judge PUTNAM of the First Circuit who dismissed a petition of a subject of the King of Italy under sentence of death imposed by a Massachusetts court, saying (*p.* 809):

> "But the case shows beyond all question "that the legislature of Massachusetts has "done its duty and the only claim brought to "our attention by the petition is that some "one, the attorney-general, the warden of the "state prison, or somebody else, is not going "to do his duty. Now beginning with the "case of *Arrowsmith* v. *Harmoning* (118 U. "S., 194) and following down through a long "line of cases, and also through a line of "parallel cases raising the same question, but "in different forms, it is held that the four- "teenth amendment does not apply where the "legislature has done its duty, and where the "fault is incidental either with the courts or "with officials; therefore so far as the four- "teenth amendment is concerned, it is clear "that we have no jurisdiction."

Manhattan Ry. Co. v. *City of New York*, 18 Fed. Rep., 195: The complainant here sought to enjoin the collection of taxes assessed by commissioners appointed pursuant to law. The Court denied the complainant's motion for an injunction, saying by WALLACE, *C. J.*, at *p.* 196:

> "The averments of the bill are intended to "make a case arising under the Fourteenth "Amendment of the Constitution, and if any "federal question is presented it arises under "that amendment. There are general aver-

"ments in substance that the state by the laws "under which the assessing officers have acted "unlawfully discriminates between the com- "plainants and individuals and subjects the "property of the complainants for the pur- "poses of taxation to an unequal share of the "public burdens."

Then, after pointing out what were the "specific "averments" of the bill, the court said (*p.* 197):

"The question is whether, the state has "made or is enforcing by its laws a system "of taxation which abridges the privileges or "immunities of the complainants or denies to "them the equal protection of the laws. If "the authorities of the City of New York are "endeavoring to enforce the collection of "taxes against the complainants which have "not been assessed in conformity with the "statutes of the state, if *the taxing authorities "under color of law are proceeding illegally,* "their action cannot be imputed to the state, "and the constitutional provision need not be "invoked and does not operate, and the com- "plainants can obtain ample redress under "the laws of the state * * * (*p.* 198). "If the complainants are entitled to any relief "against the proceedings of the defendants, "it is not through any right which springs "from the Fourteenth Amendment, but their "right is founded on the laws of the state "* * * (*p.* 199). The suit, therefore, is "not one arising under the constitution or "laws of the United States and, as no diver- "sity of citizenship exists between the parties, "this court cannot decide it. A case does not "arise under the constitution or laws of the

"United States unless it cannot be decided "without deciding a federal question (*Har-* "*tell* v. *Tilghman*, 99 U. S., 547), or, in other "words, unless a federal law is a necessary "ingredient in the case (*Osborne* v. *Bank of* "*U. S.*, 9 Wheat., 738)."

FOURTH.

The authorities cited for the Appellant do not, we submit, weaken the authorities we have cited or the inferences we have drawn from them.

Ex parte Virginia, 100 U. S., 339: It is upon this case that the Appellant seems to rest his appeal. A county judge of Virginia was indicted for his exclusion of black citizens from grand and petit juries,—the indictment being found under the federal act of March 1, 1875, entitled "An Act "to protect all citizens in their civil and legal "rights" (18 Stats., Part 3, 336). The state of Virginia supported him and itself was the petitioner in this Court for his discharge on habeas corpus.

The question whether Congress had power under the Fourteenth Amendment to assume the responsibility of a state for an act committed by one of its subordinate officers beyond the authority, and even in defiance of the authority, which the State had given him, we do not need to consider here. For there is no act of Congress analogous to the act of March 1, 1875, which applies to proceedings of the Rapid Transit Board of New York.

The passage from the opinion of Mr. Justice STRONG (*100 U. S., p.* 348) which is cited by the

Appellant at *p.* 18 of his brief, was not, as the Court will perceive, an essential part of the opinion but was to some extent *obiter dictum.* The Court had already held that the action of the county judge was not judicial but "merely a "ministerial act, as much so as the act of a sheriff "holding an execution in determining upon what "piece of property he will make a levy * * * "that the jurors are selected for a court makes no "difference." It was after stating that conclusion that Mr. Justice STRONG added the words quoted by the Appellant as follows:

> "But if the selection of jurors could be con-
> "sidered in any case a judicial act, can the
> "act charged against the petitioner be con-
> "sidered such when he acted outside of his
> "authority and in direct violation of the
> "spirit of the State statute? That statute
> "gave him no authority when selecting jurors
> "from whom a panel might be drawn for a
> "circuit court, to exclude all colored men
> "merely because they were colored. Such an
> "exclusion was not left within the limits of
> "his discretion. It is idle, therefore, to say
> "that the act of Congress is unconstitutional
> "because it inflicts penalties upon State
> "judges for their judicial action. It does no
> "such thing."

Now these words, whether *obiter* or not, must be construed with the whole body of the opinion. The State of Virginia, it is to be remembered, was before this Court itself assuming and standing for the cause of the petitioner. The petitioner acted under a general grant from the State of power to

draw jurors. He had from the State the *power* to do what he did, even if it did not authorize him to make the discrimination from a motive of bias against colored citizens. So that the all controlling proposition of the Court was that stated by Mr. Justice STRONG as follows (*p.* 347):

> "Whoever *by virtue of* public position "under a State government deprives another "of property, life or liberty without due pro- "cess of law or denies or takes away the equal "protection of the laws, violates the constitu- "tional inhibition; and as he acts in the name "and *for the State* and *is clothed with the* "*State's power,* his act is that of the State."

But in the case now at bar the authority from the State was strictly limited and included a plain prohibition upon the Rapid Transit Board to construct any rapid transit railroad otherwise than in conformity with Routes and a General Plan duly prescribed and duly approved by the necessary authorities, local and judicial.

That we apprehend the true force of the ruling of this Court in *Ex parte Virginia* is further obvious from this, that the decision was rendered at the very same time with that in *Virginia* v. *Rives*, and was pronounced by the same Justice. And we venture again to quote from the opinion in *Virginia* v. *Rives* the following words which were neither *obiter* nor unnecessary, but strictly and necessarily decisive (*100 U. S., 321*):

> "But when a subordinate officer of the "State in violation of State law undertakes

> "to deprive an accused party of a right which "the statute law accords to him as in the case "at bar, it can hardly be said that he is denied "or cannot enforce 'in the judicial tribunals "'of the State' the rights which belong to "him."

Neal v. *Delaware,* 103 U. S., 370: This was a writ of error to the Supreme Court of Delaware. And we concede at once that a judgment of the Supreme Court of any State, authorized by its organic law to conclusively interpret its laws, must be deemed to be the act of the State itself. So the act of the officers of Delaware, who, as it appeared, had been charged by the State with the general duty of selecting jurors and who had discriminated against black jurors, became the act of the State when it was supported by the highest judicial authority of the State. As as said by this Court in deciding the case, at *p.* 397:

> "The refusal of the state court to redress "the wrong by them (the officers who selected "the jurors) committed was a denial of a right "secured to the prisoner by the Constitution "and laws of the United States."

Civil Rights Cases, 109 U. S., 3: When the Court here said, by MR. JUSTICE BRADLEY, at *p.* 15, that

> "whether the statute book of the State actu- "ally laid down any such rule of disqualifica- "tion or not, the State, through its officers, en- "forced such a rule; and it is against such "State action, through its officers and agents "that the last clause of the section is di- "rected,"

the Court was again dealing with the act of 1st March, 1875; and also at *p.* 17:

> "In this connection it is proper to state that "civil rights, such as are guaranteed by the "Constitution against State aggression cannot "be impaired by the wrongful acts of individ- "uals unsupported by State authority in the "shape of laws, customs, or judicial or execu- "tive proceedings. The wrongful act of an in- "dividual, unsupported by any such authority, "is simply a private wrong, or a crime of that "individual; an invasion of the rights of the "injured party, it is true, whether they affect "his person, his property, or his reputation; "but if not sanctioned in some way by the "State, or not done under State authority, his "rights remain in full force and may presuma- "bly be vindicated by resort to the laws of the "State for redress."

Yick Wo v. *Hopkins*, 118 U. S., 356: Here an ordinance was complained of which had been adopted by a city and which denied the equal protection of the laws to Chinese. The Supreme Court of the State held that the ordinance was within the power of the city under the constitution and authorities of the State. Obviously, therefore, the ordinance was an act of the State and as such subject to review in this Court upon writ of error to the Supreme Court of the State.

The Appellants cite *Scott* v. *McNeal*, 154 U. S., 34, and *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S., 226; but they seem to us unavailing for his purpose; for there the acts complained of were made acts of the State by the approval of their highest judicial authorities.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362: Here the State by an act of its legislature had established a railroad commission giving it power to establish reasonable rates and leaving the determination of what was reasonable to the discretion of the commission. Obviously, therefore, the establishment of rates by the commission was the establishment of rates by the State itself. For, although the commissioners may not have exercised their *discretion* fairly, nevertheless the State permitted to them the discretion with the power to abuse it.

Iron Mountain Co. v. *Memphis*, 96 Fed. Rep., 113: In citing this case the Appellant quotes language by TAFT, *Circ. J.*, in which he pointed out that the thing objected to was done by the legislative council of the City of Memphis "*under its "general power of controlling the streets.*". But in the present case the Rapid Transit Board has no such general power.

Pacific Gas Co. v. *Ellert*, 64 Fed. Rep., 421: This is more nearly an authority in the Appellant's favor than any other case which he has cited. There the Circuit Judge (now Mr. Justice MCKENNA) dealt with the claim that the objectionable act of a board of supervisors was "without authority" from the State. But the act was not, as here, in express defiance of the mandate of the State. It was there said that the contention that, as the board of supervisors was proceeding without State authority, it did not represent the

State, "*appeared* to be opposed to *Ex parte Vir-*
"*ginia,* 100 U. S., 346." The learned Circuit Judge, at page 431, referred to the language of the dissenting Justices, FIELD and CLIFFORD, in *Ex parte Virginia,* who said:

> "Nor can the unauthorized action of an
> "executive officer (of a State) imposing upon
> "the rights of the citizen be taken as evidence
> "of her intention or policy so as to charge
> "upon her a denial of such rights."

This expression seemed to be taken as proof that the majority of the Court in *Ex parte Virginia* held a doctrine the reverse of that expressed by the minority. But a statement of law in a dissenting opinion is erroneous only if the majority of the court rule otherwise. We submit that there is nothing in the opinion of the Court in *Ex parte Virginia* to justify the assumption that this particular statement of the dissenting judges was overruled or that the Court intended to hold that a sheerly unauthorized act of a subordinate officer of a state is the act of the state.

II.

The court below was without jurisdiction for the reason that the bill of complaint did not show that the appellant was threatened with the deprivation of any property.

The Appellant is a mere abutter. He does not own the fee of the street in which the alleged unlawful construction is taking place. He does not dispute the general right of the State of New York by its Rapid Transit Board and under the rapid transit legislation to build a rapid transit railroad under Park Avenue. On the contrary he has, by formal consent, conceded the right. His only claim is that the railroad is unlawfully near to his property and that (Bill, *p.* 11) the risk of injury to his said residence owing to the work of construction—

> "has become much greater than it would "have been had the work been done according "to the 'routes and general plan' adopted by "the board as aforesaid and the risk of dam- "age after the railroad shall have been put "in operation by reason of the vibration "caused by trains or by other objectionable "results is in like manner greatly increased."

So his prayer for relief is (Bill, *p.* 12) for an injunction against the defendant's construction—

"under Park Avenue adjacent to complain-
"ant's said premises until the easements ap-
"purtenant thereto shall have been duly ac-
"quired according to law and due compensa-
"sation therefore made to complainant."

The fee of the streets of New York belongs to the City itself.

Hoffman, Estate and Rights of the Corporation of New York, p. 368.
People v. *Kerr,* 27 N. Y., 188.
Kellinger v. *Forty-second Street Railway Co.,* 50 N. Y., 206-211.
Matter of New York C. & H. R. R. R. Co., 77 N. Y., 248.
Drake v. *Hudson River R. R. Co.,* 7 Barbour, 508.

The only easements which the Appellant has in the street are easements of light, air and access.

Bischoff v. *N. Y. El. R. R.,* 138 N. Y., 257: The Court of Appeals of the State here said by ANDREWS, *C. J.* (*p.* 262):

"The property rights of an abutting owner
"consist of easements of light, air and access.
"There are no easements of privacy or quiet
"or other easements than those mentioned for
"which compensation can be claimed."

American Bank Note Co. v. *New York El. R. R. Co.,* 129 N. Y., 252: The same court here said by FINCH, *J.,* (*p.* 271):

"What the elevated roads take from the "abutter are his easements of *light, air and* "*access.* * * * Now, the elevated roads "take no land from the abutter. They stand "wholly upon the land owned by the munici- "pality, and no consequential damages flow- "ing from the lawful corporate user could be "recovered but from the fact that some of "them, though not all of them, have been by "the Story case transformed from conse- "quential injuries into invasions of property "rights. To the extent of that transforma- "tion the rule of damages must feel the effects "of the change, but beyond that the further "consequential injuries have not lost or "changed their character, and to allow them "as elements of compensation is to transform "them also into invasions of property, and "add a new brood of easements to those al- "ready awarded to the abutter, instead of "leaving them, where the Story case left them, "the mere incidents of a lawful use. In the "Drucker case the full extent of the transfor- "mation bringing with it the liability for dam- "ages was sketched in these words: 'Smoke " 'and gases, ashes and cinders affect and im- " 'pair the easement of air; the structure it- " 'self and the passage of cars lessen the ease- " 'ment of light; the drippings of oil and " 'water, and possibly, the frequent columns " 'interfere with the convenience of access;' "but there is no hint of any allowable recov- "ery beyond what *pro tanto* constituted some "elements of the taking. In the Lahr case, "RUGER, *Ch. J.*, was equally guarded, saying "that the incidental injuries could be recov- "ered 'provided the evidence established the " 'fact that they were destructive of the ease- " 'ments of light, air and access,' and these

"careful expressions were used although "neither case involved a question of fee dam- "age. I am adverse to adding to the abutter's "easements by changing their names and do- "ing indirectly what I am sure none of us "would do directly."

As is well stated in the brief of Messrs. Nicoll and Brown, of counsel for the Appellee, McDonald, referring to the fact that the rapid transit railroad in Park Avenue is entirely under ground, and affects neither light nor air nor access of abutters,—

"The complainant has been deprived of no "easement; and since he does not own the fee "of any part of the street, there has been no "taking of property from him through the "mere addition of another burden to the uses "to which the street has formerly been put."

We ask leave to adopt as our own the discussion of Messrs. Nicoll and Brown under this head, and especially their citations of the decisions of this Court to the effect that the alleged impairment of the comfort to be enjoyed in the plaintiff's premises through the acts of the City and its Rapid Transit Board underneath the surface of its own streets is not a taking of property within the meaning of the Fourteenth Amendment.

Marchant v. *Pa. R. R. Co.*, 153 U. S., 380.
Meyer v. *City of Richmond*, 172 U. S., 82.
Gibson v. *U. S.*, 166 U. S., 269.
Eldridge v. *Trezevant*, 160 U. S., 452.

III.

The decree should be affirmed.

EDWARD M. SHEPARD,
of counsel for the Appellee,
the Board of Rapid Transit Railroad Commissioners.

APPENDIX.

BARNEY v. *THE CITY OF NEW YORK*, *83 Appellate Division Reports* (*N. Y.*), *237*.

OPINION OF THE COURT.

INGRAHAM, *J.*: This appeal is from an order of the Special Term denying a motion for an injunction restraining the defendants from further excavating, blasting or constructing the rapid transit tunnel for the underground railroad under Park avenue adjacent to the plaintiff's premises, or from continuing the work of tunnel construction in such a manner that the easterly side of the tunnel or of the excavation therefor, shall be nearer to the building or house line than the tunnel described and shown in the routes and general plan adopted and approved by the defendants, the Rapid Transit Railroad Commissioners. The plaintiff is the owner of a dwelling house on the east side of Park avenue, at the corner of Thirty-eighth street. In pursuance of legislative authority, the Rapid Transit Commissioners prepared a general plan for the construction of an underground railroad in The City of New York. That general plan was approved by the municipal authorities, but the property owners having refused to consent to the construction of the road, application was made to this court for authority to construct and operate the said road, notwithstanding such refusal. The plans as prepared by the Rapid Transit Commissioners, and which were submitted to this Court for approval, contemplated three separate tunnels under Park avenue, in front of the plaintiff's premises, the easterly side of the easterly tunnel being thirty-seven feet and six

inches from the building line of the property on the east side of Park avenue. The centre tunnel was twenty-four feet in width, to be constructed in the middle of the avenue, and was separated from the east tunnel by a masonry wall. The centre tunnel was to contain two tracks, while the easterly tunnel was to contain one track, and it was this method of construction that was approved by this Court. After such approval, the Commissioners of Rapid Transit made the detailed plans necessary for a contract to construct the road. Upon a further consideration, the original plans were modified by substituting for the three tunnels originally proposed, two tunnels, one upon the east and the other upon the west side of Park avenue, the east side tunnel being thirty-five feet from the building line of the abutting property on the easterly side of Park avenue. The contract was made between the Commissioners of Rapid Transit and the defendant McDonald, for the construction of the road according to these modified plans. Subsequent to the execution of this contract, a further modification of these plans was considered necessary by the Chief Engineer in charge of the work, and such modification was directed by him without any formal action of the Rapid Transit Board, and without the consent of either the property owners or of this Court. By this modification, the easterly tunnel was located on the east side of Park avenue, about seven feet from the building line of the property. The construction of this easterly tunnel was prosecuted under the authority of the Chief Engineer of the Board of Rapid Transit Commissioners, with the approval of the engineer of the contractors, but without other authority. After the excavation was substantially completed, at a cost to The City of New York of upwards of $400,000, this action was commenced to enjoin the further construction of this tunnel under Park avenue, and to compel the defendants to fill up the excavation already made and to proceed with the plans as originally proposed.

The evidence is that it would cost The City of New York to comply with this demand in the neighborhood of $500,000, in addition to the money already spent, and would delay the completion of the work for about eighteen months; and the question that was presented to the Court below was, whether in view of these facts, in the exercise of its judicial discretion, this work should now be stopped, entailing upon the public and the City this delay in the prosecution of the work, with the large additional cost indicated. It is undoubtedly true that this modification of the plans, materially changing the relation of the proposed road to the abutting property without the consent of the property owners, or in lieu thereof the approval of this Court, was entirely unauthorized. The constitutional provision (Const., art. 3, §18) recognized and enforced by the statutes under which this road is being constructed (Laws of 1891, Chap. 4 as amd.), by which this railroad could not be built without the consent of the property owners, or in lieu thereof the approval of this Court, provided safeguards for the protection of property abutting upon a street through or under which it was proposed to construct a railroad. Before such a road should be constructed, the abutting owners were to be consulted; but in order to prevent the opposition of the property owners from preventing a necessary public improvement, provision was made by which an approval by this Court for the construction of such a railroad could take the place of the consent of the property owners; but that was only to be done where notice to the property owners was given so that they could be heard in opposition to the construction of the road; and the application to this Court for its approval was necessarily based upon the plans for the construction and location of the proposed road, so that the property owners could have an opportunity of presenting their objections to the road as it was proposed to be constructed and located. Before a tunnel within seven feet of the property was auth-

orized the abutting owners had the right to be heard and present their objection to a tunnel so located.

We will assume, therefore, in the disposition of this application, that the change of location was unauthorized, and if before any work had been done or substantial progress had been made in the excavation an application had been made for an injunction, that the Court would have been justified in restraining the further prosecution of the work until the necessary consents had been obtained. An entirely different question is presented where the application for an injunction is made after the excavation of the tunnel has been substantially completed and where all that remains is to construct the necessary masonry walls and supports. That it would be a much more serious injury to the plaintiff's property to leave the excavation in the condition in which it was when this action was commenced than to allow it to be proceeded with and the necessary walls and supports constructed, is apparent. The only result of now granting a preliminary injunction would be to stop the work, leaving this hole in the ground unsupported; while if the contractors are allowed to proceed with the construction of the tunnel, the adjoining property would be secure against further settling or injury. The injunction asked for, therefore, would seem to be without any advantage to the plaintiff, but would subject him and the other property owners to the danger of having the adjacent rock settle into this excavation and so injure rather than protect his property.

The learned counsel for the plaintiff insists that the operation of the road in this tunnel will be a serious injury to his property, and that for that reason the further construction of the tunnel, as at present located, should be enjoined. But we think the question of the operation of the road should be left until it can be determined, by its actual operation, whether or not such operation will entail upon the adjoining property any injury or disad-

vantage. The importance of this public improvement, the fact that it has involved the expenditure of such a large amount of public money, and the necessity for additional means of transportation of passengers in New York are facts which should be considered in determining whether the Court should interfere by an injunction which would prohibit the completion of the public improvement, or adopt other methods to protect or compensate the abutting property owners. The question is whether there should be a preliminary injunction pending the trial of the action; and we think in view of the situation, the enormous public interests involved, and the fact that such an injunction, while affecting most seriously the defendants, would be of no advantage to the plaintiff or the abutting owners, that the Court, in the exercise of the judicial discretion which it is bound to exercise in considering an application of this kind, was quite justified in refusing to grant the preliminary injunction asked for, leaving the question of the relief to which the plaintiff would be entitled to be determined upon the trial. Without attempting at all to indicate an opinion as to what the Court should do when the question as to the final judgment is presented, we affirm the order appealed from as a proper exercise of discretion in refusing to grant an injunction before judgment.

It follows that the order appealed from should be affirmed, with $10 costs and disbursements.

VAN BRUNT, *P. J.*, MCLAUGHLIN AND LAUGHLIN, *J. J.*, concurred.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1902, No. 198. 159.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, and others,
Appellees.

Memorandum in Behalf of Defendants upon the Appellant's Motion to Advance Cause for Oral Argument.

Appellant's motion to advance is made solely upon the condition that oral argument shall be permitted. The appellees concur with the appellant that this is a cause which ought to be orally argued. Since the motion concedes oral argument, the defendants refrain from opposing it.

G. L. RIVES,
Corporation Counsel, for the
City of New York.
DELANCEY NICOLL,
EDWARD M. SHEPARD,
of Counsel for Certain Appellees.

Supreme Court of the United States.

No. 159.—October Term, 1903.

Charles T. Barney, Appellant
vs.
The City of New York, The Board of Rapid Transit Railroad Commissioners for the City of New York, et al.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[March 21, 1904.]

This was a bill to enjoin the city of New York, the Board of Rapid Transit Commissioners for New York, John B. McDonald and the administratrix of Shaler, deceased, from proceeding with the construction of the rapid transit railroad tunnel under Park avenue, New York, adjacent to the premises of Charles T. Barney, "until the easements appurtenant thereto shall have been acquired according to law and due compensation made therefor to complainant;" and from constructing such railroad otherwise than in accordance with the routes and general plan adopted and approved by the local authorities and by the owners of abutting property, or the Appellate Division of the Supreme Court in lieu thereof.

From the bill it appeared that the Rapid Transit Board had, on behalf of the city, devised routes and general plans, and entered into a contract for the construction of a rapid transit railroad with McDonald, of whom Ira A. Shaler was a sub-contractor, under the Rapid Transit Acts of the State, (Laws 1891, c. 4; Laws 1892, cs. 102, 556; Laws 1894, cs. 528, 752; Laws 1895, c. 519; Laws 1900, c. 729; Laws 1901, c. 587; Laws 1902, cs. 533, 542, 544, 584.)

Park avenue was one of the streets under which the railroad was authorized to be built, and the routes and general plan of the road were prescribed by the board by resolutions of January 14 and February 4, 1897, which received the assent of the local authorities and of the Appellate Division of the Supreme Court in lieu of the consent of the abutting property owners.

Complainant alleged that he "consented to the construction of the said rapid transit railroad in accordance with the said routes and general plan of construction, and did not oppose the proceedings hereinafter mentioned, which the said Board of Rapid Transit Railroad Commissioners instituted for the purpose of obtaining the determination of three commissioners appointed by the said Appellate Division that such rapid transit railroad ought to be constructed and operated; nor did your orator oppose the confirmation of said determination by the said Appellate Division."

But complainant averred that the portion of the railroad under Park avenue and in front of his premises was being built twenty-seven feet nearer to his premises than was authorized by the Routes and General Plan; and that the work was "being thus performed by said defendant, McDonald, and the said Shaler without any authority other than certain directions given by the chief engineer employed by the Board of Rapid Transit Commissioners and embodied in certain so-called working drawings, or detail drawings, prepared by him or at his instance, and recently approved informally by said board. And . . . that the fact that such directions had been given by the chief engineer and that said work was being thus performed by the contractor, as aforesaid, was not until recently specifically known to said board; that such action of said chief engineer and contractor has never been formally or specifically approved by said board; that there has been no change made or authorized by said board in the said 'Routes and General Plan,' nor has there been any modification of the contract or specifications with reference to the construction of that part of the tunnel lying under Park Avenue between Thirty-third and Forty-first streets; that no notice was given to any of the property owners along said street that it was proposed by the defendants or any of them to change the position of the tunnel to any material extent from the position shown and described in the said 'Routes and General Plan,' nor was any opportunity ever given to said property owners or the citizens generally to be heard with respect to any such change."

Complainant further averred "that at none of the times herein mentioned did the said Board of Rapid Transit Railroad Commissioners have authority (if at all) to enter into any contract for the construction of any rapid transit railroad under or upon the said Park avenue, except in accordance with the said 'routes and general plan' contained in the said resolutions of January 14th and February 4th, 1897, and that at no time did the said board have authority to prepare detailed plans and specifications, except (if at all) in accordance with the said general plan of construction or to alter any plans or specifications prepared by them, excepting in accordance with said general plan of construction. That the act of the said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized, and the defendants McDonald and the said Shaler have entered upon the same unlawfully and without authority; and for the further reason that the construction of the rapid transit railway on the easterly side of Park avenue, in front of your orator's said premises, takes his property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that said rapid transit act, so far as it purports to authorize the construc-

tion of a tunnel and railway in said Park avenue without the consent of abutting owners or compensation therefor, is void, because it deprives your orator of his property without due process of law, in violation of the provisions of the said amendment."

On the bill and affidavits, complainant moved for an injunction *pendente lite*, and defendants resisted the motion, submitting, in pursuance of stipulation, affidavits filed in their behalf in the case of *Huntington* v. *City of New York and others*, the same defendants, since brought here, numbered at this term 173, and argued with this case. The opinion in that case, 118 Fed. Rep. 683, was adopted in this, and the court of its own motion, under section 5 of the act of March 3, 1875, c. 137, entered a decree dismissing the bill for want of jurisdiction, and certified that question to this court.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The jurisdiction of the Circuit Court was invoked upon the ground that by the tunnel construction sought to be enjoined, complainant was deprived of his property without due process of law, in violation of the Fourteenth Amendment. But that amendment prohibits deprivation by a State, and here the bill alleged that what was done was without authority and illegal.

The city acts through the Rapid Transit Board, which possesses the powers specifically vested. It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must "contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected." Consents of the municipal authorities and the abutting property owners to construction on the routes and plans adopted must be obtained, and any change in the detailed plans and specifications must accord with the general plan of construction, and, if not, like consents must be obtained to such change.

The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. And this is the view taken by the Supreme Court of New York. *Barney* v. *Rapid Transit Board*, 38 Misc. Rep. 549; *Barney* v. *City of New York*, 39 Misc. Rep. 719; *Barney* v. *City of New York*, 83 Appellate Division Rep. 237.

Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.

Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the State. Complainant's grievance was

that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the State courts to remedy acts of State officers done without the authority of or contrary to State law. *Missouri* v. *Dockery*, 191 U. S. 165; *Civil Rights Cases*, 109 U. S. 3; *Virginia* v. *Rives*, 100 U. S. 313.

In *Virginia* v. *Rives*, referring to an alleged denial of civil rights on account of race and color in the empanneling of a jury, the laws of Virginia in respect of the selection of juries appearing to be unobjectionable, Mr. Justice Strong, speaking for the court, said:

"It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sec. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. . . .

"When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sec. 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of sec. 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In the Civil Rights cases, in which the court was dealing with the act of March 1, 1875, 18 Stat. 335, c. 114, Mr. Justice Bradley said:

"In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the

shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

There are many cases in this court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii*; and in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be, those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal* v. *Wesley*, 167 U. S. 204, and *Fitts* v. *McGhee*, 172 U. S. 516. Appellant's counsel rely on certain expressions in the opinion in *Ex parte Virginia*, 100 U. S. 339, but that was a case in which what was regarded as the final judgment of a State court was under consideration, and Mr. Justice Strong also said: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

And see *Manhattan Railway Company* v. *City of New York*, 18 Fed. Rep. 195; *Kiernan* v. *Multnomah County*, 95 Fed. Rep. 849; *In re Storti*, 109 Fed. Rep. 807.

Scott v. *McNeal*, 154 U. S. 34, and *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, are cited by appellant, but in those cases judgments of the highest judicial tribunals of the State were treated as acts of the State, and no question of the correctness of that view arises here.

And so in *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission "in a court of competent jurisdiction in Travis County, Texas," and a citizen of another State sued them in the Circuit Court of the United States for the district which embraced Travis County, and this was held to be authorized by the State statute.

And as the establishment of rates by the commission was the establishment of rates by the State itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not

be regarded as unauthorized, even though they may have exercised the discretion unfairly.

Similarly in *Pacific Gas Company* v. *Ellert*, 64 Fed. Rep. 421, where a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them, its action was regarded by Mr. Justice McKenna, then Circuit Judge, as State action.

In the present case defendants were proceeding, not only in violation of provisions of the State law, but in opposition to plain prohibitions.

Section 5 of the act of March 3, 1875, 18 Stat. 470, c. 137, provided that if in any suit in the Circuit Court it should appear, to the satisfaction of the court, at any time, that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, the court should proceed no further, but dismiss the suit. The last paragraph of this section was in terms repealed by the act of March 3, 1887, 24 Stat. 552, c. 373, re-enacted August 13, 1888, 25 Stat. 433, c. 866, (the part repealed not being material here,) but otherwise the section remained and remains in full force. This case went off on the motion for preliminary injunction, and the bill was properly dismissed, whether treated as if heard on demurrer, or on the proofs by affidavit.

Decree affirmed.

No. 173.

Arabella D. Huntington, Appellant, vs. The City of New York et al. } Appeal from the Circuit Court of the United States for the Southern District of New York.

THE CHIEF JUSTICE. This case is governed by the decision just announced, and the decree is accordingly

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.